

***United States Court of Appeals
for the
District of Columbia Circuit***



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Court of Appeals of the District of Columbia

JANUARY TERM, 1934.

No. 6142

WILLIAM T. BALLARD, ABRAM R. SERVEN, AND
HARRIET T. SERVEN, APPELLANTS,

vs.

GEORGIA M. SPRUILL, APPELLEE.

493

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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Court of Appeals of the District of Columbia

No. 6142.

WILLIAM T. BALLARD, ABRAM R. SERVEN and HARRIET T.
SERVEN, Appellants,

vs.

GEORGIA M. SPRUILL.

a-c Supreme Court of the District of Columbia.

In Equity.

No. 51443.

GEORGIA M. SPRUILL, Plaintiff,

vs.

WILLIAM T. BALLARD and ABRAM R. SERVEN, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Amended Bill of Complaint for Injunction and Other Relief.*

Filed June 18, 1930.

* * * * *

The amended bill of complaint of Georgia M. Spruill respectfully states:

I. Plaintiff is a citizen of the United States and resident of the District of Columbia and brings this suit in her own right.

II. Defendants are residents of the District of Columbia, but plaintiff is not advised as to their citizenship; and said defendants are sued in their own right and as the trustees named in a certain deed of trust as hereinafter set forth.

III. That on or about July 1, 1927, plaintiff being then the owner of certain real estate located in the District of Columbia legally described as: Lot numbered twenty-nine (29) in Benjamin R. Mayfield's subdivision of lots in square 279, as per plat recorded in Liber 10 folio 11, of the Records of the Office of the Surveyor of the District of Columbia, being number 27 Iowa Circle, N. W., Washington, D. C., did make and deliver to defendants her deed of trust to them, which was thereafter recorded in Liber 5907, folio 223, et seq., of the land records in the office of the Recorder of Deeds of the District of Columbia, as security for the payment of a loan to her of Nine Thousand Dollars (\$9,000.00), said deed of trust reciting that plaintiff conveyed

her fee simple interest in said real estate to defendants, as trustees, to secure the payment of said indebtedness evidenced by three promissory notes payable to the order of one K. A. Rhinebold three years after July 1, 1927, with interest at the rate of six and one-half per cent per annum until paid, payable semi-annually. A true and correct copy of said deed of trust is appended hereto and made a part hereof, and marked "Exhibit A."

IV. That thereafter plaintiff punctually paid the interest on the indebtedness, the interest due January 1, 1928, being paid January 3, 1928; the interest due July 1, 1928, being paid July 3, 1928; the interest due January 1, 1929, being paid January 2, 1929; and the interest due July 1, 1929, being paid July 3, 1929; and at all times complied with other provisions of said trust deed.

V. That on or about January 1, 1930, plaintiff being then temporarily unable to pay the semi-annual interest due that date, requested defendant Ballard to secure an extension of time for payment thereof from the owner of the notes, conditioned on the agreement of plaintiff to pay compound interest on the sum due as semi-annual interest; and defendant Ballard failed and refused to grant such request, and also refused plaintiff's request for the name and

address of the person or persons owning the notes secured by the deed of trust, such request being based on plaintiff's desire to make a personal appeal to such owner for the extension of time; the request for the information also meeting with refusal by an employee and agent of said defendant, who stated that she could not give out such information inasmuch as she had done so once and it had caused trouble for her.

VI. That at the time of signing said deed of trust plaintiff was not given an opportunity to read or examine it thoroughly, nor were its terms read or fully explained to her, and at no time was she informed by either of the defendants that in the event there was default by her and the property advertised for sale, but not sold, she would be required to pay the trustees a fee or commission, so-called, amounting to two and one-half per cent of the total amount of the indebtedness; nor was such notice given to
3 her until after the property had been advertised for sale as hereinafter mentioned.

VII. That on February 26, 1930, the defendants caused to be published in a newspaper an advertisement of a sale to be made by them, as trustees, of said property, such sale to be made on March 10, 1930.

VIII. That upon receipt of a copy of such advertisement by mail on February 27, 1930, being the day following first publication thereof, plaintiff did tender to defendant Ballard, in cash, in the presence of a witness, the amount of interest then in default, for which said defendant had previously made demand, and also tendered the amount of certain taxes due on said property, as well as the cost to the date of tender of the advertisement mentioned, being the entire amount justly due from plaintiff, and which amount plaintiff has at all times since then been ready, willing, and anxious to pay in full and complete discharge of defendant Ballard's previous demand; and plaintiff has further been willing to pay to defendants a reasonable and legal amount as remuneration for their services, which consisted solely, to the best of plaintiff's knowledge and belief, in making demand upon her for the interest due January 1, 1930, in writing her one or more letters, and in causing to be published a form of advertisement of sale of the property at auction, and in hiring an auctioneer without, however, prepaying anything to such auctioneer

or becoming liable to him in more than a nominal amount, all of which services on the part of said trustees could not have consumed more than two or three hours of the time of one or both of them.

IX. That defendant Ballard, acting for himself and defendant Serven as the other trustee, refused and has continued to refuse to accept such tender, but insisted upon payment also and at the same time, on February 27, 1930, of an additional amount including a trustees' fee of \$225.00, being two and one-half per cent of the total amount of indebtedness, well knowing that plaintiff was not prepared for such demand and could not meet it and making such demand for the purpose of defeating plaintiff's tender.

X. That thereafter, in accordance with such advertisement, defendants, acting through an auctioneer in
4 their employ, attempted to sell said property as advertised; but plaintiff attended said sale and publicly protested the validity thereof, and, finally, without admitting its validity but only in order to protect her interests by the only means then available made a bid through an agent and a payment of Three Hundred Dollars (\$300.00), which was accepted by defendants' auctioneer, said amount being in excess of the interest in default, \$292.50, and interest thereon from date of default to date of sale or attempted sale.

XI. That since said attempted sale, defendants have recognized and admitted to plaintiff and/or her agent the defective character and effect thereof, and, by inference, the illegal nature of their demand for a grossly excessive, extortionate, and exorbitant trustees' commission and other charges; and have offered to accept such \$300.00 payment instead on account of interest in default, provided plaintiff will also pay the cost of advertising since her tender on February 27th, amounting to approximately \$71, an auctioneer's fee of approximately \$47.00, and a fee to them as trustees of \$125.00. Plaintiff has refused to accept such offer because nine of the ten days advertising was unnecessary, after her tender, the auctioneer's fee was unnecessary because the sale should not have been held, and the original demand of the trustees for a fee or commission for themselves prior to sale and the later demand are illegal, being in violation of Section 545 of the Code of Laws for the District of Columbia, second paragraph, which provides for a commission not exceeding one per cent of the indebt-

edness secured in case the debt is paid or suspended before sale under deed of trust.

XII. That upon plaintiff's refusal to pay such excessive and illegal amounts, defendants threatened and still threaten to readvertise and sell the property, and to deprive the plaintiff of the title to and possession of same, and have stated that unless payments as mentioned were made by May 21st they would proceed to readvertise and resell the property.

XIII. That by reason of defendants' refusal to credit plaintiff with payment in full of the amount in default, and to accept the tender thereof made by plaintiff, and their constant threats to sell the property and deprive plaintiff of possession thereof, plaintiff has been seriously disturbed in her lawful possession of the property, 5 which is her home, and has been greatly hampered and seriously damaged in her business of renting rooms in the house located upon said property. Furthermore, defendants' attitude and acts have prevented plaintiff from completing negotiations with other persons for a new loan to take the place of the loan maturing July 1, 1930, inasmuch as it will be impossible to satisfy the present deed of trust until defendants acknowledge payment of the interest due January 1, 1930, and therefore no new deed of trust operating as a first lien can be placed. Plaintiff states that the property is otherwise unencumbered; that the value thereof, as estimated by defendant Ballard and others, is in excess of Sixteen Thousand (\$16,000) Dollars, and the assessed value is approximately \$12,000.00; so that the property has ample value to secure another loan of \$9,000.00 to replace the loan under which defendants are trustees, provided defendants are required to desist from making unlawful and unjust demands for an amount in excess of what is due.

XIV. That at the time the loan mentioned was obtained through defendant Ballard, plaintiff inquired as to the identity of said K. A. Rhinebold, named as payee of the notes secured by the deed of trust, but said defendant gave her no information. Defendants have since refused in writing to comply with plaintiff's request for the address of said K. A. Rhinebold, whom plaintiff is unable to find, but whom she believes to be a former clerical employee of defendant Ballard; and defendants have also refused in

writing to comply with plaintiff's request for the names and addresses of the present owners of the notes secured by the deed of trust, at whose instance they state they are acting to the detriment of plaintiff; such request of plaintiff having been made for the purpose of appealing to such owner or owners for relief from the arbitrary, unjust, illegal, and inequitable acts and demands of the defendants.

XV. That the plaintiff has been informed since said attempted sale, and now believes and avers that the defendants, and at least one of them, are or is directly or indirectly, the owner of the notes secured by the deed of trust; that this fact was concealed from plaintiff at the time she executed the deed of trust, and that if she had known such

6 to be the fact she would not have executed the same but would have insisted on fair, impartial, and disinterested trustees; and by reason of such concealment, fraud, and misrepresentation on the part of said defendants as to their interest in the loan transaction, they are not legally and/or equitably entitled to act as trustees under said instrument; but that on the contrary their appointment and designation was void because fraudulent, and their acts as trustees have been and are null and void for that reason and because they have been unjust, partial, unfair, illegal and inequitable, with a view to depriving plaintiff of her property for the benefit and profit of such trustees.

XVI. That plaintiff at the time of signing said deed of trust was not informed as to its provisions for payment of trustees' commission of two and one half per cent of the total debt in event of default even though no sale were made by such trustees; and plaintiff states that such provisions are illegal, unjust, and inequitable, constituting a penalty and a forfeiture, and are not to be regarded by a court of equity as constituting a fair or just compensation for services performed, but are to be disregarded and cancelled and held null and void and not binding upon plaintiff; and plaintiff should be required to pay only the amount provided by law as previously mentioned or such amount as may be determined by the court to be just and reasonable.

XVII. That no proper and fair notice was given to plaintiff by defendants before advertising of the property for sale, nor notice given her of the penalty by way of trustees' commission that would accrue to them in the event the

property was so advertised; and that thereby plaintiff's interests were jeopardized and injured; and the allowance to defendants of the commission claimed would result, in effect, in the payment of a usurious rate of interest, exceeding the lawful rate, to such defendants as owners of the notes secured by the deed of trust.

XVIII. That plaintiff acknowledges the obligation to repay the principal sum of Nine Thousand Dollars and the contract rate of interest thereon, and does not deny or disavow her lawful obligations under such contract, and is willing, ready, and anxious to fulfill her legal and valid obligation, seeking by this suit only to restrain and prevent that which is illegal and inequitable, contrary to law and to justice.

7 XIX. That if the defendants continue to refuse to accept plaintiff's payment aforesaid and tender in discharge of the amount in default or is due, and if said defendants put into execution their expressed intention to sell the property and dispossess plaintiff, she will be deprived of her home and means of support, and otherwise seriously and irreparably as well as immediately damaged, and she will suffer loss or injury for which there is no plain, adequate, and complete remedy at law.

XX. Wherefore, the premises considered, plaintiff prays:

1. That the defendants, and each of them, or their successors in trust, be restrained *pendente lite*, and permanently, from selling or offering to sell the property hereinbefore described by reason of the alleged default in connection with the interest payment due January 1, 1930, and that the court shall determine what sum, if any, may be due from plaintiff to the owners of the notes secured by the deed of trust as of February 27, 1930, in excess of the amount then and subsequently tendered and paid by plaintiff; and that upon the payment of such sum, if any, the defendants or the owners of the notes secured shall be required to deliver to plaintiff a receipt in full for the interest payment due January 1, 1930, and a release from any and all claims heretofore made by them in connection with the alleged default in such payment.

2. That the Court appoint impartial, disinterested trustees under said deed of trust in the place and stead of the defendants herein, to execute the terms of such trust.

3. That process issue against the defendants and each of them, commanding them to appear herein and answer the exigencies of this bill.

4. That ascertainment be made, in the manner provided by law or the practice of this Court, of the damages in money occasioned to plaintiff by reason of the fault and/or illegal and/or inequitable action and failure and refusal to act of the defendants or either of them, and judgment be entered therefor including the costs of this proceeding and other costs, including specifically counsel's fees.

5. That the defendants and each of them, or their successors in trust, be restrained *pendente lite* from selling or offering to sell the property hereinbefore described by reason of any alleged failure on the part of plaintiff to pay the interest or principal indebtedness.

6. That a rule to show cause issue out of this Court, directed to the defendants, requiring them to appear herein on a day certain and show cause why the restraining orders prayed herein be not granted.

7. And for such other and further relief as the nature of the case may require.

GEORGIA M. SPRUILL,
Plaintiff.

O. H. BRINKMAN,
Her Attorney.

DISTRICT OF COLUMBIA, ss:

I, Georgia M. Spruill, being first duly sworn, depose and say that I have read the foregoing bill of complaint by me subscribed and know the contents thereof; that the matters and things therein stated as of my own knowledge are true and those stated upon information and belief I believe to be true.

GEORGIA M. SPRUILL.

Subscribed and sworn to before me this 18th day of June, 1930.

[SEAL.]

AUGUSTA SILVERMAN,
Notary Public, District of Columbia.

Service of copies of the above and foregoing amended bill of complaint is hereby acknowledged on behalf of defend-

ants William T. Ballard and Abram R. Serven, this 18 day of June, 1930.

GEORGE W. OFFUTT (O. E. F.),
*Counsel for William T. Ballard
and Abram R. Serven.*

PLAINTIFF'S EXHIBIT A.

Recorded July 5, 1927, at 3:00 P. M.

No. 450.

Trust.

This indenture made this first day of July A. D. 1927, by and between Georgia M. Spruill, of the District of Columbia, party of the first part, and William T. Ballard and Abram R. Serven, Trustees, of the same place, parties of the second part,

Whereas the said Georgia M. Spruill is justly indebted unto K. A. Rhinebold in the full sum of Nine Thousand (\$9,000.00) Dollars for money loaned and for which the said Georgia M. Spruill, has executed and delivered her three (3) certain promissory notes bearing even date with these presents, and numbered one (1) to three (3) both inclusive; note numbered one (1) being for the sum of Seven Thousand (\$7,000.00) Dollars, and notes numbered two (2) and three (3) being for the sum of One Thousand (\$1,000.00) Dollars each, all of said notes payable to the order of the said K. A. Rhinebold, three years after date, with interest at the rate of six and one-half (6½%) per cent per annum until paid, payable semi-annually; each installment of interest to bear interest after maturity, if not then paid, at the rate aforesaid.

And whereas the party of the first part desires to secure the prompt payment of said debt, and the interest thereon, as well as any renewals or extensions of said notes, when and as the same shall become due and payable, and of all costs and expenses incurred in respect thereto, and of all costs and expenses, including reasonable counsel fees incurred or paid by the said parties of the second part, or substituted trustee, or by any person hereby secured, on

account of any litigation at law or in equity which may arise in respect to this trust or the property hereinafter mentioned, while this trust continues, and of all money which may be advanced as herein provided for, with interest at the rate of six (6%) per centum per annum on all such costs and sums so advanced, from the date of such advance.

Now, Therefore This Indenture Witnesseth, that the party of the first part, in consideration of the premises, and of one dollar lawful money in hand paid by the parties of the second part, the receipt of which, before the sealing and delivery of these presents, is hereby acknowledged, have granted, and do by these presents grant, unto the parties of the second part, in fee simple, the following described land and premises, situate in the District of Columbia, and

known and designated as and being Lot numbered
10 Twenty-nine (29) in Benjamin R. Mayfield's subdivision of lots in square 279, as per plat recorded in Liber 10 folio 11, of the records of the Office of the Surveyor of the District of Columbia, together with all and singular, the improvements, ways, easements, rights, privileges, and appurtenances to the same belonging, or in anywise appertaining, and all the estate, right, title, interest and claim, both at law and in equity, or otherwise however, of the party of the first part, of, in, to or out of the said land and premises.

In and Upon the Trusts, Nevertheless, hereinafter declared; that is to say: In Trust to permit said Georgia M. Spruill, her heirs, or assigns, to use and occupy the said described land and premises, and the rents, issues and profits thereof to take, have and apply to and for her or their sole use and benefit, until default be made in the payment of any one or all of said promissory notes hereby secured or of any installment of interest thereon, when and as the same shall become due and payable, or of any taxes, assessments or insurance as required by the covenants herein contained, or of any commission or expense herein provided for.

And upon the payment of all of said notes and the interest thereon, and all moneys advanced or expended as herein provided, and all other proper costs, charges, expenses, commissions and half commissions, at any time before the sale hereinafter provided for, to release and reconvey the said described premises unto the said

Georgia M. Spruill, her heirs, or assigns, at her or their cost.

And upon this further trust, upon any default or failure being made in the payment of any one or all of said notes or of any instalment of principal or interest thereon, when and as the same shall become due and payable, or upon any default being made in the payment of any taxes or assessments now due or which may become due or be assessed against said land and premises or any part thereof, during the continuance of this trust, or upon any default being made in the payment, after demand therefor, of any money advanced as herein provided for, or of any proper cost, charge commission or expense in and about the same, then and at any time thereafter, the said parties of the second part or the trustee acting in the execution of this trust,

11 shall have the power and it shall be their duty or his duty thereafter to sell, and in case of any default of any purchaser, to resell the said described land and premises, at public auction, upon such terms and conditions, in such parcels, at such time and place, and after such previous public advertisement as the parties of the second part or the trustee acting in the execution of this trust, shall deem advantageous and proper; and to convey the same in fee simple, upon compliance with the terms of sale, to, and at the cost of, the purchaser or purchasers thereof, who shall not be required to see to the application of the purchase money; and from the proceeds of said sale or sales: Firstly, to pay all proper costs, charges and expenses, including all fees and costs herein provided for, and all moneys advanced for taxes, assessments, and insurance with interest thereon as herein provided, and all taxes, general and special, due upon said land and premises at the time of sale, and such expense, if any, as may be necessary to vest a complete title in the purchaser, and to retain as compensation a commission of five (5%) per centum on the amount of the said sale or sales: Secondly, to pay whatever may then remain unpaid of said notes, whether the same shall be due or not, and the interest thereon to date of payment, it being agreed that said note shall, upon such sale being made before the maturity of said notes, be and become immediately due and payable at the election of the holder thereof; and Lastly, to pay the remainder of said proceeds if any there be, to said Georgia M. Spruill, her heirs, or assigns, upon the surrender and

delivery to the purchaser, his, her or their heirs or assigns, of possession of the premises so as aforesaid sold and conveyed, less the expense, if any, of obtaining possession.

And the said Georgia M. Spruill, does hereby agree at her own cost, during all the time wherein any part of the matter hereby secured shall be unpaid or unsettled, to keep the said improvements insured against loss by fire — the sum of Nine Thousand (\$9,000.00) Dollars in the name and to the satisfaction of the parties of the second part, or substituted trustee, in such fire insurance company or companies as the said parties of the second part may select, who shall apply whatever may be received therefrom to the payment of the matter hereby secured, whether due

12 or not, unless the party entitled to receive shall waive the right to have the same so applied; and also to pay all taxes and assessments, both general and special, that may become due on, or be assessed against, said land and premises during the continuance of this trust, and that upon any default or neglect to so insure, or pay taxes and assessments, when and as the same shall become due and payable, said parties of the second part, or the trustee acting in the execution of this trust, shall have the power and it shall be their or his duty upon request of any party secured hereby, to make sale of said land and premises as hereinbefore provided, it being understood and agreed, however, that any party hereby secured in the event of such default or neglect to so insure or pay said taxes and assessments, may at his option either treat the whole of said indebtedness hereby secured as in default or may himself pay said taxes and assessments and the premiums for such insurance, in which latter event the sum or sums so paid shall be a charge hereby secured and bear interest at the rate of six (6%) per centum per annum, from the date of such payment.

And it is further agreed that if the said property shall be advertised for sale, as hereinbefore provided, and not sold, the trustees or trustee acting shall be entitled to one-half the commission above provided, to be computed on the amount of the debt hereby secured.

And the said party of the first part covenants that she will warrant specially the property hereby conveyed and that she will execute such further assurances of said land as may be requisite or necessary.

In testimony whereof, on the day and year first hereinbefore written, the said party of the first part has hereunto set her hand and seal.

Signed, sealed and delivered in presence of—

[SEAL.]

GEORGIA M. SPRUILL.

DISTRICT OF COLUMBIA, *To wit:*

I, Harry J. Kane, Jr., a Notary Public in and for the District of Columbia, do hereby certify that Georgia M. Spruill, party to a certain deed bearing date on the 1st day of July A. D. 1927 and hereto annexed, personally appeared before me in said District, the said Georgia M.

Spruill being personally well known to me as the 13-13e person who executed the said Deed, and acknowledged the same to be her act and deed.

Given under my hand and seal, this 1st day of July, A. D. 1927.

[NOTARIAL SEAL.]

HARRY J. KANE, JR.,

Notary Public, D. C.

14 *Answers of Defendants William T. Ballard and Abram R. Serven to Amended Bill of Complaint.*

Filed May 9, 1932.

* * * * *

The defendants, William T. Ballard and Abram R. Serven, for an answer to the amended bill of complaint filed herein, respectfully show unto this Honorable Court as follows:

I. The defendants admit the allegations of Paragraph I of said amended bill of complaint.

II. Defendants admit that they are residents of the District of Columbia, and say that they are citizens of the United States and that they are trustees in the certain deed of trust in Paragraph II of said amended bill of complaint mentioned.

III. Defendants admit the allegations of Paragraph III of said amended bill of complaint with reference to the execution and contents of the deed of trust therein mentioned, and admit that Exhibit "A" attached to said amended bill of complaint is a true copy of said deed of trust.

IV. Defendants admit the payments of the various interest installments set forth in Paragraph IV of said

amended bill of complaint on or about the times therein mentioned, but deny that plaintiff "at all times complied with other provisions of said trust deed," for that she was, as thereafter admitted in said amended bill, in default in interest and as hereinafter shown also in default in the payment of taxes on the real estate conveyed in said deed of trust.

V. Defendants admit that on or about January 1, 1930, plaintiff, then being in arrears in the semi-annual interest due on that date, requested an extension from defendant Ballard of time for payment of the interest then due, 15 conditioned on the offer of plaintiff to pay compound interest on the sum due as semi-annual interest, but deny that defendant Ballard refused to grant plaintiff's request and, instead thereof, aver that plaintiff's said request for extension of time was allowed by defendant Ballard, except that said defendant did not require as a condition thereof the payment of compound interest on the semi-annual interest due, as proposed by plaintiff, said extension being admitted by plaintiff elsewhere in said amended bill. Further answering said paragraph, defendants say that on or about December 12, 1929, defendant Ballard notified plaintiff by letter, as was his custom in such cases, that the semi-annual interest on said notes for \$9,000.00, amounting to \$292.50, would be due and payable at the office of defendant Ballard on January 1, 1930; that some little time after the plaintiff received this notice she came to the office of defendant Ballard and notified him that she would not be able to pay the interest when due, and asked for an extension of time to January 15, 1930, which extension of time was granted by defendant Ballard; that when this extension expired plaintiff informed defendant Ballard that she would be unable to pay the interest at that time and asked for an additional extension, which defendant Ballard granted her by letter until February 1, 1930; that when this extension expired plaintiff still claimed that she would be unable to pay the interest at the last date mentioned and requested a further extension, which defendant Ballard granted until February 15, 1930; that after this extension was granted and upon examination of the records of the tax office of the District of Columbia, it was found by defendant Ballard for the first time that the taxes due September 1929 were in arrears; that plaintiff then stated to defendant Ballard that she had no prospect of paying the

16 interest before July 1, 1930, when the entire loan would mature, and asked for a further extension until that time; that defendant Ballard then told her this was not satisfactory and suggested that she endeavor to secure a loan somewhere else, and said he would wait a few days more to enable her to do so. Defendants further say that it was in connection with one or more of the requests stated with reference to the extensions that plaintiff inquired of defendant Ballard as to who was or were the owner or owners of the notes secured by said deed of trust. Defendants say that the reason that defendant Ballard and his employee did not disclose the owner of said notes was because defendant Ballard was and always has been the active trustee in connection with the transaction here involved, and that the reason for not so disclosing the owner of said notes was for the purpose of avoiding the unnecessary annoyance that would come from repeated demands being made upon said owner by plaintiff for extensions, as defendant Ballard was in entire charge of the matter and was fully authorized to grant all reasonable and proper extensions. Defendants further say that plaintiff was in no way prejudiced by the failure or refusal of defendant Ballard or his employee to disclose the ownership of the notes, inasmuch as defendant Ballard was fully authorized to grant any extensions which the owner of the notes would have granted, and did grant such extensions.

VI. Answering Paragraph VI of said amended bill, defendants say they have no knowledge or information sufficient to form a belief as to whether or not at the time of signing said deed of trust plaintiff was given an opportunity to read or examine it thoroughly, or whether its terms were read or fully explained to her. Defendants admit that plaintiff was not informed by either of the defendants personally prior to the advertisement for sale that in
17 the event there was default by her and the property advertised for sale but not sold she would be required to pay the trustees a fee or commission, so-called, amounting to 2½% of the total amount of the indebtedness, but defendants have no knowledge or information sufficient to form a belief as to whether or not she was given notice with reference to these provisions until after the property had been advertised for sale, as in said paragraph alleged, for the reason that on or about July 1, 1927, after said deed of

trust and said notes were prepared in the office of defendant Ballard, same were delivered to the Columbia Title Company and defendants or neither of them were present at the time said papers were executed by plaintiff or conducted the execution thereof. Defendants are informed and believe and therefore aver that said plaintiff went to the title company and there signed the notes and executed the said deed of trust before a Notary Public in the office of said title company, neither of these defendants being present at the time, settlement being made on behalf of plaintiff as well as of defendants by said title company. Defendants are informed and believe and therefore aver that said plaintiff had abundant time, both before and at the execution of said deed of trust and deed of trust notes, to examine the same and to seek any explanation thereof from the officers and agents of said title company that she might desire.

VII. Defendants admit the allegations of Paragraph VII of said amended bill of complaint. Defendants further say in this connection that inasmuch as plaintiff had declared that she would be unable to pay said overdue interest until July 1, 1930, when the entire principal would become due, and as she furnished no information which would lead to the belief that she would probably be able to pay it at that time, and inasmuch as values in the real estate market were falling, defendants felt that the safety of the investment was endangered and required action upon their part.

VIII. Defendants admit that upon receipt of a copy of said advertisement by mail on February 27, 1930, being the day following the first publication thereof, plaintiff did tender to defendant Ballard, part in cash and part by check, the amount of interest then in default, for which said defendant had previously made demand, but defendants deny that plaintiff tendered the amount of certain taxes due on said property; deny that she tendered the cost to the date of tender of the advertisement mentioned, and deny that she has since signified a willingness so to do. Defendants say that as provided in said deed of trust the trustees were entitled to a commission of $2\frac{1}{2}\%$ upon \$9,000.00, amounting to \$225.00, which plaintiff at the time mentioned and ever since has refused to pay. Further answering said paragraph defendants say that defendant Ballard, by way of endeavoring to obtain a settlement of plaintiff's obligation, went considerably beyond the activi-

ties and services mentioned in said paragraph, but they are advised that defendants' remuneration in the premises is fixed by the deed of trust aforesaid and is not dependent upon the circumstances in said paragraph set forth. Defendants say in further answer to said paragraph that defendant Serven has never at any time claimed or demanded of the defendant Ballard, or the plaintiff, any interest in or part of any trustees' fees that might accrue under said deed of trust.

IX. Defendants admit the allegations of Paragraph IX of said amended bill of complaint as to defendant Ballard's refusal to accept said tender and his continuance so to refuse and his insistence upon said trustees' commission of \$225.00, but deny that they knew that plaintiff was not prepared to meet the demand, and deny that such demand was made by defendant Ballard for the purpose of defeating plaintiff's tender.

X. Defendants in answer to Paragraph X of said amended bill of complaint say that a sale was made by defendants acting through an auctioneer, but deny that said auctioneer was in their employ except in acting as a public auctioneer, to sell said property as advertised; that plaintiff did, as in said paragraph averred, attend said sale and publicly protest the validity thereof; that the sale was upon March 10th, as advertised; that the sale took place in front of the premises and the property was sold to a bidder who turned over to the auctioneer a deposit of \$300.00; that the sale was made to one Mary Hananghan for \$9,550.00; that defendants did not know upon the date of sale that said bid was in fact made by said Mary Hananghan on behalf of plaintiff, or that it was not a bona fide bid; but that the \$300.00 deposited with said auctioneer at the time of said sale was for the purpose of complying with the terms of sale to that extent; that the day of the sale was fair, the attendance good, and the circumstances otherwise favorable for a fair sale, with the exception of plaintiff's public protest; that said Mary Hananghan has never carried out her contract of purchase.

XI. Defendants deny that since attempted sale they or either of them have ever admitted to plaintiff or her agent that said attempted sale was defective or irregular in any manner, and deny that they or either of them have ever

recognized or admitted to plaintiff or her agent, either directly or by inference, that they ever made any demand for an excessive, extortionate or exorbitant trustees' commission or other charges, and deny that any such illegal, excessive, extortionate or exorbitant demands were ever at any time made by them or either of them upon plaintiff; they admit that by way of compromise defendant Ballard

20 at one time offered to apply said \$300.00 payment on account of interest in default, provided plaintiff would also pay the balance of the cost of advertising, amounting to \$67.50, the auctioneers' fee of \$15.00, and a trustees' commission of \$125.00. As to the remainder of said paragraph defendants are advised that the same is argumentative and state conclusions of law which defendants are not required to answer.

XII. That answering Paragraph XII of said amended bill of complaint, defendants deny that they or either of them ever made any demands upon plaintiff for any excessive or illegal amounts as therein inferred, and further answering said Paragraph XII say that upon the failure of said Mary Hananghan to carry out her bid, in conformity with the terms of sale, defendant Ballard on April 21, 1930, at the request of plaintiff's attorney, O. H. Brinkman, gave plaintiff until May 21, 1930, in which to pay the required amount to meet the interest and expenses in connection with the previous sale, with the information that if the amounts were not paid at that time the property would be re-advertised for sale under the terms of the deed of trust, and confirmed this by letter to said Brinkman on the following day; that thereafter, and prior to the expiration of said extension, to-wit, on May 20, 1930, this suit was commenced.

XIII. That answering Paragraph XIII, defendants say that they have no knowledge that a refusal on their part to credit plaintiff with payment in full of the amount in default, or the other acts alleged to have been done by defendants, had seriously disturbed plaintiff in her lawful possession of the property or greatly hampered and seriously damaged her in her business of renting rooms in the house located upon said property, or that defendants' attitude and acts have prevented plaintiff from completing negotiations with other persons for a new loan to

21 take the place of the loan maturing July 1, 1930, but defendants say that if these results have oc-

curred, they were necessary consequences of plaintiff's own default, and not the result of any act or acts of these defendants. Defendants further say that they have no knowledge that it was impossible to satisfy the existing deed of trust until defendants acknowledged payment of the interest due January 1, 1930, and that no new deed of trust operating as a first lien could be placed. Defendants have no knowledge whether or not the property is otherwise unencumbered. They deny that the value thereof at the time of the execution of the amended bill of complaint, June 18, 1930, was \$16,000.00, and deny the inference that the demands of the defendants for what was justly due prevented in any way the securing of said new loan. Further answering said paragraph defendants say that during the period from said March 10th to May 20th, 1930, defendant Ballard urged the plaintiff, and also two or more attorneys who said they were representing her, to endeavor to procure a new loan to take up the present one against the property, and defendant Ballard referred her to such institutions as might possibly make the loan for her; that plaintiff's reply to this suggestion was that she would have no difficulty in getting the money from one of the local trust companies and at a lower rate of interest, but no new loan was secured by plaintiff; that defendant Ballard was informed that said plaintiff did make application for a loan from the Perpetual Building Association, which agreed to lend her \$7,500.00; that defendant Ballard is likewise informed and believes that plaintiff made an application for a loan to Albert W. Jacobson, who has offices at 1001 15th street, N.W., who has informed said defendant that he, Jacobson, was prepared to make the loan for her, but that she, the plaintiff, refused to execute the necessary papers to

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secure the loan.

XIV. That answering Paragraph XIV defendants have no knowledge of any inquiry being made by plaintiff at the time of the execution of the deed of trust and notes as to the identity of K. A. Rhinebold, the payee named therein, but aver that plaintiff was then personally acquainted with said K. A. Rhinebold. They admit that defendants have failed to comply with plaintiff's subsequent request for the address of said Rhinebold, because at the time of such request it was then not known to the defend-

ants. Defendants admit that K. A. Rhinebold was an employee in the office of defendant Ballard July 1, 1927, and until sometime in February 1930; that her name was used in said deed of trust and notes by defendant Ballard according to a general custom prevailing in brokers' offices in the District of Columbia by which deeds of trust and notes are drawn in the names of nominal or "straw" parties for the greater convenience of such brokers for the negotiation and sale thereof. Defendants deny that plaintiff was injured by the use of a nominal or "straw" party in said deed of trust and notes or by any failure on the part of defendants to disclose her whereabouts; that said Rhinebold left the employ of defendant Ballard in February 1930, for the purpose of being married, and is understood to have left the District of Columbia and gone to some point in Louisiana unknown to these defendants. Defendants further say that they have fully answered the remaining averments in said Paragraph XIV in Paragraphs V and XV hereof.

XV. Answering Paragraph XV, defendants deny that they or either of them are or ever have been the owner or owners of the notes secured by the said deed of trust, but aver the facts to be that said notes were drawn July 1, 1927, being three in number, for \$7,000.00, \$1,000.00 and 23 \$1,000.00, respectively, by plaintiff to K. A. Rhinebold and by her endorsed without recourse to the order of A. R. Serven, one of the defendants herein, who has since held said notes as custodian for the owner thereof. Defendants deny that the ownership of the notes was concealed by them from plaintiff at the time she executed the deed of trust and aver that no circumstance or condition existed at that time, or has ever existed, which would give rise to any reason or advantage for them concealing such information from plaintiff. Defendants have no knowledge as to what the attitude of plaintiff would have been had she known who was the owner of said notes, but deny that they or either of them have ever been unjust, partial, unfair or in any manner arbitrary toward the plaintiff, and especially deny that they or either of them in any act done have ever been prompted with a view to deprive plaintiff of her property for their benefit or profit; that all action taken by them has been solely to protect such notes by sale of the property after all reasonable means of securing payment

by plaintiff had been exhausted. Defendants deny that plaintiff has been damaged or in any manner retarded or hindered in the payment of said notes or interest thereon or in refinancing said loan by reason of their or either of them being trustees in said deed of trust, or by their failure to disclose to plaintiff the name of the owner of said notes because, as heretofore shown, defendant Serven at all times agreed to all reasonable extensions and which agreements were made with the defendant Ballard, for the benefit of plaintiff, who in the first instance secured said loan for and on behalf of plaintiff.

XVI. Answering Paragraph XVI of said amended bill, defendants say they have no knowledge or information whether plaintiff was informed as to the provisions for payment of the trustees' commission provided for in
24 the said deed of trust, and further say upon information and belief that plaintiff had full opportunity to inform herself of all the conditions in said deed of trust as set forth in Paragraph VI hereof. Defendants deny that such provisions in said deed of trust are illegal, unjust or inequitable, or constitute a penalty or forfeiture, as alleged by plaintiff, and deny that the compensation therein provided for was in excess of the value of the services performed.

XVII. Defendants are advised that they acted in each and every matter in the course of this transaction in accordance with the exact terms of the deed of trust.

XVIII. Defendants have no knowledge as to the willingness, readiness or anxiety of the plaintiff to fulfill her legal and valid obligation, except her statement to defendant Ballard that she had no prospect of paying the interest in default before July 1, 1930, when the loan would mature. and say that they are advised that the remainder of the allegations of said paragraph they are not required to answer. Defendants say, however, that there has never been any tender on the part of the plaintiff of the amount of the principal sum of said obligation, or expenses incurred on account of her default in payment of accrued interest.

XIX. In answer to Paragraph XIX of said amended bill of complaint, defendants say that they were acting entirely in accordance with the terms of the deed of trust hereinbefore referred to and as they are required to do by law.

XX. Whereas, having fully answered said amended bill of complaint defendants pray that same be dismissed with costs.

WILLIAM T. BALLARD,
ABRAM R. SERVEN,
Defendants.

25 DISTRICT OF COLUMBIA, ss:

We do solemnly swear that we have read the foregoing answer by us subscribed and know the contents thereof; that the matters and things therein stated upon information and belief, we believe to be true, and those stated upon personal knowledge are true.

WILLIAM T. BALLARD.
ABRAM R. SERVEN.

Subscribed and sworn to before me this 2nd day of May, A. D. 1932.

OLIVE E. FITZGERALD, [SEAL.]
Notary Public, D. C.

GEORGE W. OFFUTT,
Attorney for Defendants.
CHARLES V. IMLAY,
Of Counsel.

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Supplemental Answer.

Filed May 25, 1932.

* * * * *

Come now the defendants, William T. Ballard and Abram R. Serven, and further answering the amended Bill of Complaint of the plaintiff filed herein, in conformity with the motion of the plaintiff seeking that the Court require said defendants to make more definite and certain Paragraphs XIV and XV of their answer heretofore filed herein, respectfully state as follows:

1. That the defendant, William T. Ballard, has no interest whatever, either as custodian or otherwise in the several notes secured by the Deed of Trust described in the Amended Bill of Complaint filed herein, except as Trustee under the Deed of Trust securing the same.

2. That the name of the party for whom the defendant, Abram R. Serven, acts as custodian of the several notes

described in the said Amended Bill of Complaint, and who is the owner thereof in her own right is Harriet T. Serven, wife of the defendant, Abram R. Serven.

WILLIAM T. BALLARD,
ABRAM R. SERVEN,
Defendants.

DISTRICT OF COLUMBIA, ss:

We do solemnly swear that we have read the foregoing answer by us subscribed and know the contents thereof; that the matters and things therein stated upon information and belief, we believe to be true, and those stated as upon personal knowledge are true.

WILLIAM T. BALLARD.
ABRAM R. SERVEN.

Subscribed and sworn to before me this 25 day of May, A. D., 1932.

OLIVE E. FITZGERALD, [SEAL.]
Notary Public, D. C.

27 *Supplemental Bill of Complaint.*

Filed July 27, 1932.

* * * * *

Comes now the plaintiff, Georgia M. Spruill, and with leave of Court supplements her amended bill of complaint in the above-entitled cause by addition of the following:

XXI.

That after the filing of the amended bill of complaint herein the defendants Ballard and Serven, still persisting in their refusal to give to plaintiff the name or names of the owner or owners of the notes executed by plaintiff and described in the amended bill of complaint proceeded to hold an auction sale of plaintiff's property heretofore described in said amended bill of complaint, without demand upon plaintiff for payment and without accounting for or returning payment previously made by plaintiff through her agent, and without waiving or relinquishing their unlawful and unauthorized claim theretofore asserted for trustees' fee or commission.

No notice was given to plaintiff of said auction sale except by advertisement published in a newspaper beginning about July 5, 1930, the sale being held on or about July 16, 1930. Said sale was attended by only a few persons, and there was only one bidder, to-wit, William D. Buck, whom plaintiff understands and believes to be a resident of the District of Columbia, and who has an office in and does business in said District. At said sale and previously, and before a bid was made, plaintiff gave notice to said Buck and others present at said sale that it was illegal and that

28 said defendants were without lawful authority to act as trustees and to order and conduct a sale of said property, and that said sale was not justified or legally authorized and was being and would be contested by proceedings in Court.

Nevertheless, the said Buck made a bid of \$10,500.00 (Ten Thousand Five Hundred Dollars) for the property of plaintiff, which said bid was accepted by the auctioneer at the direction and behest of the defendants Ballard and Serven as trustees.

Plaintiff is informed and believes that said Buck is a man of little or no means, and that said sale was not a bona fide one, but that said Buck bid and bought in the property acting for and in behalf of said defendants Ballard and Serven or one of them, who were then the real or equitable owners of the notes secured by the deed of trust under which the sale was held. And plaintiff is also informed and believes that said Buck was given assurance that he would not be required to complete the purchase for himself or his undisclosed principal in the event the suit theretofore filed by plaintiff ultimately resulted in a decision in her favor, and that he was indemnified against any loss resulting from his bid or subsequent acquisition and possession of the property.

Thereafter, to-wit on August 6, 1930, a deed was recorded with the Recorder of Deeds of the District of Columbia, conveying said property to William D. Buck and Esther H. Buck, his wife, whom plaintiff is also informed and believes to be a resident of the District of Columbia, said deed being executed and signed by defendants Ballard and Serven, and dated August 1, 1930. There was also recorded with the Recorder of Deeds of the District of Columbia on or about August 6, 1930, a deed of trust signed and executed by

29 said William D. Buck and Esther H. Buck, conveying said property to George W. Offutt and Daniel E. Campbell, as trustees, to secure the payment of two notes of \$3,500.00 each executed by said Bucks, payable one year and two years respectively after date. Plaintiff is informed and believes that said Offutt and Campbell are residents of the District of Columbia and/or have their offices in and do business in said District. Plaintiff is also informed and believes that said Offutt was and is attorney and agent for said defendants Ballard and Serven and that he and said Campbell are in reality acting as trustees and agents for said defendants as the real or equitable owners of the notes and indebtedness.

That although the bid accepted at said auction sale was \$1,500.00 in excess of the indebtedness claimed under the notes executed by plaintiff, defendants Ballard and Serven have made no accounting or offer of accounting to plaintiff for said excess or surplus, nor have they tendered her any sum, nor returned to her nor offered to return the sum of \$300.00 previously paid by or for her, although pretending to act as trustees in receiving such sums and as trustees being accountable therefor. Neither have such defendants paid or offered to pay to plaintiff the amount of taxes on such property which she subsequently paid on said property.

XXII.

- That thereafter, to-wit, on or about November 24, 1930, said William D. Buck, acting, as plaintiff is informed and believes, for himself and Esther H. Buck, defendants Ballard and Serven and/or other parties at present unknown to plaintiff caused said plaintiff and her furniture and personal property to be forcefully evicted from said premises and real property described in the amended bill of
30 complaint, and to be put out upon the street, and to be damaged and injured; all without right or justification, whereby plaintiff suffered great damage and loss which she asks the Court to ascertain and fix.

And thereafter said Buck, acting for himself and the others named herein (not including plaintiff) caused said real property to be rented or leased to others, and has all the time since November, 1930, received the rents and profits

from said property and not accounted therefore or paid any part thereof to plaintiff, but has retained the same for himself and/or the others named herein.

And by reason of such eviction, plaintiff was deprived of her furniture and other personal property and has since been unable to recover same, and has been injured and damaged and suffered loss thereby.

Said Buck and/or the others named herein for whom he acted have failed to keep said real property and improvements in proper repair, whereby it has been damaged; and they have caused certain structural changes to be made therein, without authority of plaintiff, which have damaged said property and caused it to become of less value.

And plaintiff has suffered great bodily and mental injury by reason of being unlawfully and unjustly deprived of her home and property.

XXIII.

Plaintiff is informed and believes that said Buck and the others named herein may attempt to alienate or further encumber said real property, to deprive plaintiff of her rights and interest therein, and prevent her from recovering possession thereof; all to her irreparable loss and injury.

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XXIV.

Plaintiff states that by reason of the facts recited herein said William D. Buck, Esther H. Buck, George W. Offutt, and Daniel E. Campbell, properly should be made parties to this action and their presence is necessary and proper for a complete determination of the case, said parties being responsible for taking and withholding possession of the property among other acts injurious to plaintiff.

XXV.

Wherefore, the premises of this supplemental bill of complaint being considered, together with the allegations of the amended bill of complaint, plaintiff prays, in addition to the prayers heretofore entered:

8. That the deed to said William D. Buck and Esther H. Buck be cancelled and rescinded, and that the deed of trust given by them to George W. Offutt and Daniel E. Campbell be cancelled and satisfied or released of record, and that

the notes secured thereby be declared not a lien against the real property involved herein and not a charge against plaintiff or an indebtedness against her.

10. That said William D. Buck, Esther H. Buck, George W. Offutt, and Daniel E. Campbell, be made parties to this case and that process issue against them, requiring them to answer or plead to this supplemental bill of complaint and the amended bill of complaint.

11. That said William D. Buck and Esther H. Buck and/or the other defendants be required to surrender possession of said property to plaintiff.

12. That said William D. Buck, Esther H. Buck, George W. Offutt, and Daniel E. Campbell be restrained
32 from alienating or attempting to alienate and/or encumber said property and be required to answer whether they have attempted to or intend to otherwise encumber or alienate said property; and that the Court issue restraining orders and/or injunctions, temporary and permanent, restraining encumbrance or alienation by any of said persons, or their successors or assigns.

13. That all of the parties named herein, other than plaintiff, be required to account for any and all moneys received on account of said property, either as deposits on sales or attempted sales, payments on account of sales, rents, forfeitures, interest, etc., and all profits derived in any way from said property.

14. That ascertainment be made, in the manner provided by law or the practice of this Court, of the damages sustained by plaintiff by reason of the illegal sale and/or sales of said property, the eviction of plaintiff, the deprivation of her property real and personal, bodily and mental injury sustained, and all other damage or loss inflicted upon or suffered by plaintiff by reason of the fault and/or illegal and/or inequitable action and failure and refusal to act of all parties named herein other than plaintiff, and judgment be entered therefor including the costs of this proceeding and other costs, including specifically counsel's fee.

15. That said William D. Buck and Esther H. Buck and/or their successors or assigns be required to execute deed to said property to plaintiff, and be required to restore to her all personal property of which she was deprived by their action or that of either of them.

16. That rules to show cause issue out of this Court, directed to all defendants, requiring them to appear
33 herein on a day certain and show cause why the restraining orders and injunctions prayed herein be not granted.

17. And for such other and further relief as the nature of the case and this supplemental bill of complaint may require.

GEORGIA M. SPRUILL,
Plaintiff.

O. H. BRINKMAN,
Attorney for Plaintiff.

DISTRICT OF COLUMBIA, ss:

I, Georgia M. Spruill, being first duly sworn, depose and say that I have read the foregoing bill of complaint supplemental to my amended bill of complaint, by me subscribed, and know the contents thereof; that the matters and things therein stated as of my own knowledge are true and those stated upon information and belief I believe to be true.

GEORGIA M. SPRUILL.

Subscribed and sworn to before me this 30th day of June, 1932.

[NOTARIAL SEAL.] MARGARET MACPHERSON,
Notary Public, District of Columbia.

Service of copies of the above and foregoing supplemental bill of complaint is hereby acknowledged on behalf of defendants Ballard and Serven this 1st day of July, 1932.

GEORGE W. OFFUTT, (F.)
Attorney for Said Defendants.

34 *Answer of Abram R. Serven and William T. Ballard to Supplemental Bill of Complaint.*

Filed September 6, 1932.

* * * * *

Come now Abram R. Serven and William T. Ballard and for answers to the supplemental bill of complaint filed herein say as follows:

XXI. These defendants deny that they persisted in their refusal to give to plaintiff the name or names of the owner or owners of the notes executed by plaintiff but say that plaintiff made no further requests on these defendants for such information; your defendants Serven and Ballard admit that they as trustees offered said property for sale and did sell said property at public auction on, to wit, July 16th, 1930, after notice to plaintiff herein; your defendants further say that the loan of \$9,000.00 secured by Deed of Trust having become due in full July 1st, 1930, during all of which time plaintiff did not tender the amount due nor has she or any one for her tendered said amount, or any amount, your defendants further admitting that said property was sold to one William D. Buck on July 16th, 1930, at and for \$10,500.00, which said amount was insufficient to pay the principal of said loan together with the charges due thereon, including interest, taxes, etc.; your defendants have no knowledge as to the financial ability of the said William D. Buck, but if the same be material require strict proof thereof; your defendants further say that said Buck did not buy in the property acting for and in behalf of said defendants Ballard and Serven, or any of them, but bought the same on his own behalf. Defendants deny that said defendants Serven and Ballard were the real or equitable owners of the notes secured by the

35 deed of trust under which the sale was made but say on the contrary that the real legal and equitable owner thereof was Harriet T. Serven as set forth in the supplemental answer of these defendants filed to the amended bill of complaint herein. Defendants admit that the sale to said Buck and the settlement with him was on the condition that he would not be required to complete the purchase price for himself in the event the suit heretofore filed by plaintiff ultimately resulted in a decision in her favor; that to this extent said Buck was to be indemnified against any loss resulting from his buy or subsequent acquisition and possession of the property.

Defendants admit that on said August 6th, 1930, the deed transferring the property from said trustees to said William D. Buck and his wife Esther H. Buck, was put on record, and that upon the same date a deed of trust to George W. Offutt and Daniel E. Campbell was put on record as set forth in the said supplemental bill. These

defendants admit the residences and identity of said Offutt and Campbell as set forth in said supplemental bill.

These defendants are advised that they have been under no duty to account to plaintiff for the alleged excess of \$1,500.00, as set forth in said supplemental bill inasmuch as the plaintiff by reason of the litigation in this property has encumbered the title and the contract of sale could not be fully completed with said Buck and his wife; that they are further advised that they are under no duty to return to said plaintiff the sum of \$300.00 previously paid by her or for her. Defendants are advised that they are under no legal duty to return to plaintiff the amount of taxes on the property which she alleges she has paid thereon, inasmuch as the payment was made voluntarily after the foreclosure of the property, but they say that upon the termination of this litigation and the quieting of the title they are ready and willing to reimburse the plaintiff to the extent of the taxes so paid subsequent to the foreclosure.

36 XXII. These defendants admit that on or about November 24th, 1930, the plaintiff and her goods were evicted from the said real estate, but say that the same was done by due process of law in execution of a judgment rendered in favor of said William D. Buck and his wife against the plaintiff in a certain cause in the Municipal Court of the District of Columbia, entitled William D. Buck v. Georgia M. Spruill, No. —, wherein judgment for possession was rendered in favor of said Buck and his wife after they became the owners of the property, whereupon a writ of restitution was duly issued and executed; that prior to the execution of said writ of restitution, plaintiff, the defendant in said Municipal Court case had prosecuted a petition to the Court of Appeals for a writ of error which was denied; and defendants are advised therefore that said procedure was not as alleged by plaintiff, without right or justification; that they are not informed as to any damages that may have been suffered by plaintiff but say that if such damages were so suffered they are without responsibility in the premises.

These defendants admit that the premises were leased by said Buck, and that he has received rents and profits from said property and that he has not accounted to plaintiff therefor, but has retained the same for himself, but

these defendants are advised that he is within his rights in so doing.

37 These defendants are informed and believe that plaintiff's furniture and other personal property so placed upon the street as aforesaid was, upon her failure to remove and take possession of the same, delivered to the property clerk of the Police Department of the District, and that these defendants are not responsible therefor.

These defendants deny that said Buck has failed to keep said real property and improvements in proper repair or that it has become damaged thereby; they deny that structural changes have been made therein except in so far as changes have been made for the purpose of necessary repairs, but are advised that in any event they are not responsible therefor.

These defendants have no information upon which to form a belief as to the bodily and mental injury suffered by plaintiff by reason of being unlawfully and unjustly deprived as she alleges of her own property, but that if the same be material they demand strict proof thereof.

XXIII. Answering Paragraph XXIII of said Supplemental Bill these defendants deny that they have any intention to alienate or further encumber said real property, and are informed and believe that said Buck and his wife have no such intention.

XXIV. These defendants answering Paragraph XXIV of said Supplemental Bill say that the same states conclusions of law which they are not required to answer.

Wherefore having fully answered said Supplemental bill, these defendants pray that the same may be dismissed with costs.

WILLIAM T. BALLARD.
ABRAM R. SERVEN.

GEORGE W. OFFUTT,
CHARLES V. IMLAY,
Attorneys for Defendants.

38 DISTRICT OF COLUMBIA, ss:

Abram R. Serven and William T. Ballard, being first duly sworn, on oath depose and say that they have read the foregoing Answer by them subscribed and know the

contents thereof; that the matters and things therein set forth as of personal knowledge are true and those set forth as upon information and belief, they believe to be true.

WILLIAM T. BALLARD.
ABRAM R. SERVEN.

Subscribed and sworn to before me this 6th day of September, A. D. 1932.

[NOTARIAL SEAL.] OLIVE E. FITZGERALD,
Notary Public, D. C.

39 *Answer of George W. Offutt and Daniel E. Campbell
to Supplemental Bill of Complaint.*

Filed October 21, 1932.

* * * * *

Comes now the defendants, George W. Offutt and Daniel E. Campbell, and answering the Supplemental Bill of Complaint filed herein, make answer and say:

1. That they have no personal knowledge of the matters and things set up in Paragraph XXI of the said Supplemental Bill of Complaint, and therefore can neither admit nor deny the same, but if the same should become material, they demand strict proof thereof. Further answering, they say that they are informed and believe that they were named as trustees in a Deed of Trust as set forth in said Supplemental Bill of Complaint, but that they did not know at the time the paper was executed or until comparatively recently that they were named as trustees, in that they were not consulted concerning the same at the time. These defendants deny that they are in reality acting as trustees and agents for the defendants, William T. Ballard and Abram R. Serven, as the real or equitable owners of the notes and indebtedness described in the said paragraph, but admit that the defendant, George W. Offut, was and is the attorney of record for the defendants, William T. Ballard and Abram R. Serven.

2. Answering Paragraph XXII of the Supplemental Bill of Complaint, these defendants say that they have no personal knowledge of the contents of said paragraph, and can neither admit nor deny the same, but call for strict proof thereof in the event the averment therein should become material.

40 3. Answering Paragraph XXIII of the Supplemental Bill of Complaint, these defendants say that

they have no personal knowledge of the contents of said paragraph, and can neither admit nor deny the same, but call for strict proof thereof in the event the averment therein should become material.

4. Answering Paragraph XXIV, your defendants deny that they are responsible in any way for the taking and withholding of the possession of the property described in said Supplemental Bill of Complaint, or that they have done any other act injurious to plaintiff.

5. And having fully answered, these defendants pray that they may be dismissed with reasonable costs in their behalf.

GEORGE W. OFFUTT,
DANIEL E. CAMPBELL,
Defendants.

DEWITT C. SCHICK,
Attorney for Defendants,
George W. Offutt and Daniel E. Campbell.

DISTRICT OF COLUMBIA, ss:

We, George W. Offutt and Daniel E. Campbell, being first duly sworn, depose and say that we have read the foregoing Answer by us subscribed and know the contents thereof; that the matters and things therein stated as of our own knowledge are true, and those stated upon information and belief, I believe to be true.

GEORGE W. OFFUTT.
DANIEL E. CAMPBELL.

Subscribed and sworn to before me this 21st day of October, A. D., 1932.

[NOTARIAL SEAL.]

OLIVE E. FITZGERALD,
Notary Public, D. C.

41 *Findings of Fact, Conclusions of Law Opinion.*

Filed July 3, 1933.

* * * * *

The Court makes the following Findings of Fact and Conclusions of Law—

1. For sometime prior to the filing of this suit plaintiff had operated a rooming house at premises 27 Iowa Circle,

now Logan Circle, being subplot 29 in square 279 in the City of Washington. She bought the house in 1927. At the time of the purchase she arranged to borrow \$9,000 through defendant Ballard with which to purchase the property. Mr. Ballard has been engaged for many years in the real estate business in Washington. He appraised the property at that time at \$15,000.

2. Defendant Ballard has had many dealings with defendant Abram R. Serven. Mr. Serven is a lawyer, in active practice, and for many years a member of the bar of this Court. He handles moneys belonging to his wife. On July 1, 1927, plaintiff obtained a loan of \$9,000 from Mr. Ballard. She executed three promissory notes, one for \$7,000, and two for \$1,000 each, all payable three years after date to the order of K. A. Rhinebold, and secured by deed of trust on the above mentioned property. The trustees in the deed of trust are William T. Ballard and Abram R. Serven. Plaintiff did not read the deed of trust at the time of its execution, nor was she told in detail of its contents.

3. Mr. Ballard had the deed of trust prepared and decided who the trustees were to be; Serven did not know he had been named trustee until the dispute arose in this case. The payee of the notes, Miss Rhinebold, was
42 a clerk in Ballard's office. At the direction of Ballard she endorsed the notes to Serven. Ballard thereupon took the notes to the office of Serven. Mr. Serven is nearly blind and cannot see sufficiently to read. The endorsement of the notes was not shown to him and he did not know of their form until this dispute arose.

I find as a fact that the amount of the notes was paid out of the funds belonging to and being the separate property of Harriet T. Serven, wife of defendant Serven, and that the notes were her property and were held by her husband for her as her agent or trustee.

The transaction was handled by Ballard in his usual manner and the notes were made payable to his clerk in accordance with his usual practice.

4. Until sometime in 1929 plaintiff conducted her rooming house in such manner that out of the moneys realized therefrom she was able to pay current expenses, taxes and the interest on the loan, and to obtain for herself a living, including clothing. However she was not able to pay the

instalment of taxes which fell due in September, 1929, amounting to \$98.45, and she was not able to pay the interest of \$292.50 due January 1, 1930. The profits from her rooming house were insufficient to enable her to make these payments.

5. Plaintiff applied to Ballard and obtained extensions to February 15, 1930, within which to pay the interest due on January 1. She informed Ballard that when the loan matured on July 1 she expected to refinance the loan and to pay off the notes involved in this case. During these discussions plaintiff asked Ballard for the name of the holder of her notes. Her object was to make personal application to the holder for further extensions. Ballard refused to give her the name of the holder. His reason for refusing was that it was not customary to do so and he feared that Mrs. Serven would be annoyed by repeated visits from plaintiff. I find that Mr. Ballard's reason was a good one, and that his refusal was justifiable.

6. On February 26, 1930, after the extensions above, plaintiff failed to pay the interest due and the trustees advertised the property for sale at public auction, the sale to be held on March 10, 1930. Shortly after the first advertisement was issued Ballard mailed plaintiff a copy of the advertisement. The advertisement was in the usual form and was inserted the usual number of times in a newspaper published in the city of Washington. Upon receipt of the advertisement plaintiff borrowed and tendered to Ballard the amount of interest then in default, and offered to pay the cost of advertising to the date of that tender. Ballard refused to accept the tender, asserting that the trustees were entitled to a commission of $2\frac{1}{2}\%$ or \$225 under the deed of trust. On March 10, 1930, plaintiff paid the taxes on the property which became due in September, 1929.

The sale was conducted on March 10, 1930, by Thomas J. Owens & Sons, auctioneers. Plaintiff was present. Defendants did nothing to depress the price to be obtained and did nothing which was otherwise inconsistent with their duties as trustees to the party secured and to the maker of the notes. The property was sold to Mary Hannanghan, and she made the required deposit of \$300 cash. She thereafter refused to complete the sale. She was acting as agent

for plaintiff in bidding in the property. Owens de-
44 ducted the expenses of the sale and paid the balance
to Mr. Ballard, and the latter now holds the same
amounting to approximately \$185. The trustees were of
opinion that this amount was forfeited by the purchaser
because of her failure to complete the purchase.

7. Thereafter plaintiff employed as her attorney Mr.
Brinkman. He obtained a written extension of the time
to settle the costs and expenses of said sale until May 21,
1930.

At some time Mr. Ballard withdrew his insistence that
commissions be paid on the March auction sale but he al-
ways insisted that plaintiff was liable for and should pay
the costs of that sale, that is, advertising expenses and auc-
tioneers' fees amounting to about \$115.

8. Before the expiration of said extension the original
bill of complaint was filed in this cause. Thereafter an
amended bill of complaint was filed, and on July 3, 1930,
a decree was signed dismissing the amended bill, from
which an appeal was duly taken and perfected by plaintiff,
she giving a cost bond.

9. On July 1, 1930, the notes secured on said property
all fell due. Plaintiff endeavored to raise sufficient money
with which to pay off the notes and refinance her loan but
was unable to do so. It is not disputed that plaintiff bor-
rowed in cash the \$9,000 represented by said notes, and
that she was legally obligated to pay the same on and after
July 1, 1930. It is admitted that the holder of the notes,
Mrs. Serven, was then entitled to be paid. At that time
she had the choice of various remedies. Apparently the
handling of the matter was left with Mr. Ballard. He be-
lieved that values of real estate in Washington were declin-
ing and that a sale should be made promptly in view of
plaintiff's inability to pay the indebtedness. Accord-
45 ingly the trustees proceeded to sell the property
under the deed of trust. On July 6, 1930, they ad-
vertised the property for sale at public auction, the sale
to be held on July 16. On that day in accordance with the
advertisement Ballard and Serven offered the real estate
described in the deed of trust for sale at auction through
Thomas J. Owens & Sons, auctioneers. Plaintiff was pres-
ent at the sale. The trustees did nothing to depress the
price or to lessen the amount to be obtained at that sale.

In deciding to sell the property under the deed of trust I find that the trustees were acting in good faith and in the belief based upon reasonable grounds (including the decision of this court) that they had the legal right to do so.

10. Ballard acting on behalf of Mrs. Serven, owner of the notes, procured defendant William D. Buck to attend the sale and to bid on the property. The sale was conducted in the usual manner. Plaintiff at the auction notified Mr. Buck that he could not obtain good title through the sale. The auctioneer's recollection is that at least two bids were made on the property. Mr. Buck bid \$10,500, and that bid was accepted by the auctioneer. Buck made a deposit of \$300 but that was later returned to him by Ballard. The terms of the sale were one-third cash and the balance in two instalments. Buck received a deed to the property and gave two notes for \$3,500 each, but did not make the cash payment of \$3,500. The evidence shows that some agreement was made between Ballard and Buck under which the latter had the option to return the property when the litigation was terminated or to keep it. It is not necessary to decide the exact details of this arrangement. I find

46 that in making the purchase Buck was acting in behalf of the owner of the notes, Mrs. Serven.

The trustees Ballard and Serven executed a trustee's deed to the property dated August 1, 1930, conveying the property to said Buck. He executed two notes, each for \$3,500, and executed a deed of trust conveying the property to George W. Offutt and Daniel E. Campbell as trustees to secure the trustees Ballard and Serven for the payment of said notes.

11. Thereafter defendant Buck brought suit in the Municipal Court of this District in landlord and tenant proceedings against plaintiff to secure possession of premises 27 Logan Circuit. Defendant demanded and obtained a jury trial. At the trial the court directed a verdict for defendant for possession. On October 17, 1930, judgment was entered on the verdict for defendant for possession of the premises. Application to the Court of Appeals by plaintiff herein for writ of error was denied. On November 24, 1930, a writ of restitution was executed by a Deputy Marshal. Plaintiff knew that the writ of restitution was to be executed. She refused entrance to the house and it was necessary for the Deputy to break the outer door. The

furniture and goods of plaintiff were moved upon the street and remained there about twenty-four hours. A picture of the furniture in this condition was taken and published in one of the newspapers in Washington. Defendants had nothing to do with the taking of the picture or its publication. The next day the property clerk of the police department took possession of the furniture and has held it ever since, except a small portion which was returned to plaintiff shortly after the eviction. Until the spring of 1932 plaintiff was told she could not have the furniture unless

47 she paid the accumulated storage charges. In the spring of 1932 she was told by the property clerk that she could have the furniture at any time she would take it, and without making any payment whatever. Plaintiff declined to take possession of the property. She testified she had no place to put it and she saw no reason why she should take possession of it if the police department would keep it for her without any charges.

12. Shortly after defendant Buck obtained possession of the property Ballard rented the same to Manolah Brennan by the month for \$50 per month, said monthly agreement to remain in force until the litigation in this case was decided, and in the event the litigation were favorable to defendants Ballard and Serven the tenant Manolah Brennan had the option to purchase the property for \$10,000. The property was then in good structural condition but in need of plumbing repairs and refinishing. Said Brennan proceeded to make numerous repairs, papering the same at a cost of \$150, replacing a bathtub and replacing other cracked and worn plumbing. After repairing and refinishing the house as aforesaid said Brennan furnished it and then sublet it at the rate of \$100 per month.

13. Ballard has collected the rent from said Manolah Brennan and has paid the taxes upon the property and \$46 for repairs to the roof. Ballard has retained the moneys collected by him to await the outcome of this litigation. They now aggregate about \$1,000.

14. Plaintiff testified that at the time of the eviction the house was damaged in certain respects; that just before the trial she had gone through the house and she described certain alterations made in it which she thought were injurious to the property. Thereupon her counsel moved to

48 refer to a Master the question of damages. In support of his motion he stated that plaintiff had only recently learned of the alterations and damages to the property and she was without funds to obtain witnesses to prove the extent of these damages. I thereupon offered to go through the property in the presence of counsel and the parties and to endeavor to obtain a disinterested witness from the office of the building inspector in the District to testify to the cost of restoring the property to its original condition. Plaintiff's counsel refused to accede to this suggestion, stating that he would object to any employe of the District as a witness, and that he preferred to get his own witnesses. He further stated that he thought an inspection of the premises by me would be useless as he did not think I was qualified to form a judgment upon the extent of injuries and changes and the cost of repairs and restoration. Therefore I have not inspected the premises. Upon the evidence before me I am unable to find the extent of any alleged injuries, alterations and damages, or to find what it would cost to repair and restore the property to its original condition.

Counsel Fees.

15. I adopt and make part of this Finding by reference Mr. Brinkman's "Memorandum in Support of Allowance of Fee to Plaintiff's Attorney" as a statement of the services rendered by him to plaintiff. Mr. Brinkman states that plaintiff visited him at least five hundred times. I do not pass upon the reasonableness of Mr. Brinkman's charge as between him and plaintiff. I do find that he has been compelled by plaintiff to devote more time to her case than was reasonable in order to successfully handle it. For three years the case has been the principal object of plaintiff's thoughts. She is quite voluble when discussing this case. It is clear that she has required much more
49 of her attorney's time than was necessary to this case.

I find that \$2,000 would be a liberal fee for the services reasonably proper and necessary to handle this case from the beginning to the present time on behalf of plaintiff.

16. Plaintiff has never been prepared and able to pay the amount due from her upon the notes aggregating \$9,000 herein described. She was not able to pay them at the

time of their maturity or at the time of the auction sale in 1930 and she has never since been able to pay them.

17. The reasonable rental value of the house here involved when furnished is \$1,400 per year. Only \$100 is being paid at the present time, and Ballard as an expert testified that was the reasonable value. The house has been rented in an unfurnished condition for \$50. The taxes upon the property and interest on Mrs. Serven's loan aggregate about \$800. I find that the rental value of the property unfurnished is \$800 per year and that the presence of furniture adds \$600 per year to its value.

There is no evidence in the case upon which I can find the fair market value of the house in 1930 or at the present time.

18. Plaintiff claims punitive damages in a large amount. Whether she is entitled to punitive damages I regard as a close question.

The evidence is convincing that she was wholly unable to pay the debt and interest which she owed on July 1, 1930, when the notes matured. The holder of the notes demanded about \$115 for the expenses of the March sale.

50 This I find she was not entitled to. I think it probable however that had plaintiff been able to pay the principal and interest due upon her notes this claim for \$115 would not have prevented settlement of the case.

In advertising the property for sale I find that defendants were acting in good faith. This court had held that plaintiff's bill did not state a cause of action. Plaintiff was unable to pay her debt and therefore it was reasonable to assume that defendants were entitled to proceed in the usual way. At such a sale the holder of the notes had the right to buy the property in order to protect herself. She had the right to buy the property in her own name or to have an agent buy it for her.

I have difficulty in deciding why the property was bought in the manner heretofore found. Counsel who argued the motion to dismiss was not consulted and I assume defendants acted on their own judgment. I have reached the conclusion that the trustees desired to acquire control of the house on behalf of the owner of the notes and that they preferred not to disclose the fact that the property was being acquired on her behalf, but preferred that the purchaser should appear to be acting independently and on his

own behalf. There was a lack of frankness and it seems to me an element of oppressiveness in purchasing the property in this way. Therefore I have finally decided that the case is one in which punitive damages may be allowed.

The attorney for plaintiff sincerely contended that the punitive damages should be sufficient in amount to enable plaintiff to acquire her property entirely relieved of her debt of \$9,000. It seems to me that such a finding would be unjust.

When the sale was completed plaintiff was evicted
51 from the premises. There is no evidence to justify the belief, had the property been sold by Ballard alone or by a trustee appointed by this court, that more than \$10,000 could have been obtained. If there had been a judicial sale at that price plaintiff would have been evicted from the property.

I think punitive damages should be large enough to include counsel fees and cover something for the plaintiff herself. I fix punitive damages in the sum of \$3,000.

This is arrived at by allowing \$2,000 to cover counsel fees and allowing \$1,000 otherwise.

If I am wrong in concluding as matter of law that counsel fees may not be allowed as part of actual damages, and the Court of Appeals should allow counsel fees as such damages, my finding of punitive damages should be reduced to \$1,000.

19. In 1932 and 1933 defendants have paid for taxes on said property sums aggregating \$393.80.

20. Plaintiff's furniture has been and is now in the custody of the property clerk of the police department. For more than a year it has been at her disposal whenever she wanted it and without costs to her. The allowance of the rental value of the house in a furnished condition renders unnecessary any further finding with respect to the furniture. There was no evidence to justify a finding that the furniture was injured in any way.

Conclusions of Law.

I make the following conclusions of law—

1. Defendants Ballard and Serven acted in violation of the rights of plaintiff in conducting the sales in March and July, 1930.

2. The purchase by Buck at the sale in July, 1930
52 was on behalf of Harriet T. Serven, who was then
the equitable owner of the notes of \$9,000 before de-
scribed.

3. The prayers of the petition to vacate and to annul the
deed to Buck and deed of trust by him should be granted.

4. No damages are assessed against defendant Buck.

5. Plaintiff is entitled to the reasonable rental value of
her property from November 24, 1931 to June 30, 1933 (see
Finding 17), and to punitive damages (see Finding 18).

6. Plaintiff is not entitled to counsel fees as part of her
actual damages.

7. Plaintiff is entitled to a return of or an accounting for
the deposit of \$300 made by her agent at the sale in March,
1930.

July 1, 1933.

JESSE C. ADKINS,
Justice.

Opinion.

The foregoing findings of fact and conclusions of law
render unnecessary a lengthy opinion.

Upon the facts and law I have reached the conclusion
that plaintiff is entitled to the following damages:

Rental value of the house from November 4, 1930	
to June 30, 1933 @ \$1,400 per year.....	\$3,645.83
Deposit at March sale.....	300.00
Punitive damages.....	3,000.00
Total.....	<u>\$6,945.83</u>

53 Defendants are entitled to credit for the following:

Taxes paid by them on the property (about), \$393.80.

Interest on \$9,000 in accordance with the terms of the
notes.

Counsel will please calculate these credits.

Plaintiff still owes the principal sum of \$9,000.

Several times during the argument counsel for plaintiff
stated that plaintiff desired the sale to Mr. Buck and the
conveyances growing out of that sale to be annulled. Ac-
cordingly the decree will so provide.

The decree should provide that upon payment of the
balance due to the holder of the notes a fee simple title is
to be vested in plaintiff or her nominee.

If plaintiff for any reason does not pay this sum a trustee should be appointed to make sale of the property in the usual way. It is probably unnecessary to appoint said trustee until plaintiff indicates that she is unable to pay the money due her or for other reasons prefers to have the property sold under direction of the court. Plaintiff may have until September 1 to determine whether she will pay the debt or whether the sale shall take place.

If plaintiff decides that the property shall be sold by the trustees the decree should provide that the sale should not occur until October 16, with the option to plaintiff to pay the debt and secure the property any time before the sale occurs.

After June 30 I think defendants should not be charged with rent, nor plaintiff with interest; the one may offset the other. If the matter is not settled before another
54 instalment of taxes falls due, the taxes shall be charged to plaintiff because the delay will be for her benefit.

If a trustee is appointed and plaintiff later pays off the debt and takes the property, commissions of the trustee and any expenses incurred in preparing for sale of the property should be charged to plaintiff.

The decree should provide that plaintiff and those whom she seeks to interest in the property should at all times be given reasonable opportunity to inspect the property in order to ascertain its value and desirability.

My calculations do not purport to be exact. I have announced the principles and request that counsel agree upon the exact figures. If they are unable to agree I will settle their differences. The dates which I have fixed are to control whether the decree is signed now or hereafter.

If because of the appeal by plaintiff or for any other reason the sale is not closed and settlement made before November 1, 1933 I think after that date plaintiff should be charged with interest on the principal debt and taxes and should have credit only for the rent actually collected by defendants.

If either or both parties wish to appeal, the decree should be signed as soon as possible so that the appeal may be prosecuted without delay.

July 1, 1933.

JESSE C. ADKINS,

Justice.

55 *Motion for Leave to File Intervening Petition.*

Filed Sep. 6, 1933.

* * * * *

Comes now Harriet T. Serven, by her attorney, George W. Offutt, and moves this Honorable Court for leave to file the accompanying Intervening Petition, and to be made a party defendant in the above-entitled cause.

GEORGE W. OFFUTT,
Attorney for Harriet T. Serven.

To O. H. Brinkman, Esq.:

Please take notice that the above Motion will be presented to the Honorable Justice, Jesse Adkins, on Friday, September 8, 1933, at ten o'clock A. M., or as soon thereafter as counsel may be heard.

GEORGE W. OFFUTT,
Attorney for Harriet T. Serven.

Intervening Petition.

* * * * *

Comes now Harriet T. Serven, and with leave of Court first had and obtained, files this Intervening Petition, and states unto this Honorable Court as follows:

1. That she is a citizen of the United States, a resident of the District of Columbia, and files this Intervening Petition in her own right.

2. That she is the owner of the several notes aggregating Nine Thousand Dollars, dated July 1, 1927, made payable to the order of K. A. Rhinebold, and payable three years after date, and made and executed by the plaintiff in
56 the above-entitled cause; and that this Honorable Court in its Findings of Fact found as follows:

“I find as a fact that the amount of the notes was paid out of the funds belonging to and being the separate property of Harriet T. Serven, wife of defendant Serven, and that the notes were her property and were held by her husband for her as her agent or trustee.”

3. That this Honorable Court in its Conclusions of Law found as follows:

“The purchase by Buck at the sale in July, 1930, was on behalf of Harriet T. Serven, who was then the equitable owner of the notes of Nine Thousand Dollars, before described.”

4. Your intervenor further says that the plaintiff had notice of her claim in that on or about the 14th day of March, 1932, the attorney for the plaintiff served upon the attorneys for the defendants, Ballard and Serven, a Motion to require the defendants to state the name or names of the party or parties for whose benefit they claimed to be acting as trustee or custodian, and who they claimed to be the owner of the several notes secured by the Deed of Trust. Your intervenor further says that in answer to said motion, the defendants, William T. Ballard and Abram R. Serven on the — day of May, 1932, filed a Supplemental Answer in which they set forth the following:

“That the name of the party for whom the defendant, Abram R. Serven, acts as custodian of the several notes described in the said Amended Bill of Complaint, and who is the owner thereof in her own right is Harriet T. Serven, wife of the defendant, Abram R. Serven.”

5. That your intervenor further says that she appeared at the trial of the cause, being required to do so by a subpoena of this Court issued and served upon her to appear as a witness for the plaintiff, but that she was not called as such.

6. That your intervenor further states that she is
57 advised and believes that she is a necessary party to the cause in order to have a complete determination thereof, and respectfully prays unto this Honorable Court as follows:

1. That she may be made a party defendant in the above-entitled cause.

2. And for such other and further relief as to the Court may seem meet and proper under the circumstances.

HARRIET T. SERVEN,

Intervening Petitioner.

GEORGE W. OFFUTT,

Attorney for Harriet T. Serven.

DISTRICT OF COLUMBIA, ss:

I do solemnly swear that I have read the foregoing petition by me subscribed and know the contents thereof; that the matters and things therein stated upon information and belief, I believe to be true, and those stated as upon personal knowledge are true.

HARRIET T. SERVEN.

Subscribed and sworn to before me this 6th day of September, A. D., 1933.

[SEAL.]

OLIVE E. FITZGERALD,
Notary Public, D. C.

58

Order Making Party Defendant.

Filed September 8, 1933.

* * * * *

Upon consideration of the Intervening Petition of Harriet T. Serven, the evidence adduced in the above-entitled cause, and the Supplemental Answer filed herein by William T. Ballard and Abram R. Serven, it appearing to the Court that Harriet T. Serven is a necessary and proper party defendant in order to have a complete determination of the above-entitled cause, it is by the Court this 8th day of September, A. D., 1933,

Ordered that Harriet T. Serven be made party defendant in the above-entitled cause.

By the Court.

JESSE C. ADKINS,
Justice.

Plaintiff notes an exception.

JESSE C. ADKINS,
Justice.

59

Answer of Harriet T. Serven.

Filed September 14, 1933.

* * * * *

Comes now Harriet T. Serven, defendant, by her attorney, George W. Offutt, and for answer to the Amended

Bill of Complaint filed herein, and the Supplemental Bill of Complaint adopts all of the averments of the answers of William T. Ballard and Abram R. Serven, filed herein.

She adopts as evidence to be adduced by her all of the evidence heretofore adduced by said defendants, William T. Ballard and Abram R. Serven, and announces her case as closed.

GEORGE W. OFFUTT,
Attorney for Harriet T. Serven.

DISTRICT OF COLUMBIA, ss:

I do solemnly swear that I have read the foregoing answer by me subscribed as attorney for Harriet T. Serven, and know the contents thereof; that the matters and things therein stated upon information and belief, I believe to be true, and those stated as upon personal knowledge are true.

GEORGE W. OFFUTT.

Subscribed and sworn to before me this 8th day of September, A. D. 1933.

[NOTARIAL SEAL.] OLIVE E. FITZGERALD,
Notary Public, D. C.

60

Decree.

Filed October 23, 1933.

* * * * *

This cause came on to be further heard at this term; and thereupon, upon consideration thereof, it is this 23rd day of October, A. D. 1933,

Adjudged, ordered and decreed:

1. That the Deed of Trust, dated July 1, 1927, executed by the plaintiff herein and recorded July 5, 1927, in Liber 5907, folio 223, et seq., of the Land Records of the District of Columbia, is hereby declared to be operative as a valid and subsisting lien, but that all alleged sales of the real estate described in said Deed of Trust, to wit:

Lot numbered Twenty-nine (29) in Benjamin R. Mayfield's Subdivision of Lots in Square Two Hundred and Seventy-nine (279) as per plat recorded in Liber 10, Folio 11, of the Records of the Office of the Surveyor of the District of Columbia,

made by said defendants, Abram R. Serven and William T. Ballard as trustees alleged to be executed pursuant to the power and authority granted in said Deed of Trust and all deeds executed by defendants, William D. Buck and Esther H. Buck, to defendants, George W. Offutt and Daniel E. Campbell, Trustees, or to others, are hereby vacated, set aside and declared to be null and void, and of no effect.

2. That the Deed of Trust dated July 1, 1927, recorded in Liber 5907, Folio 223, et seq., of the Land Records of the District of Columbia, conveying said real estate from the plaintiff, Georgia M. Spruill, to the defendants, Abram R. Serven and William T. Ballard, securing K. A. Rhinebold in the sum of Nine Thousand Dollars (\$9,000.00) be and the same is reinstated as and is hereby declared a valid and subsisting lien and that the amount of plaintiff's indebtedness to the defendant, Harriet T. Serven, present holder of the notes secured thereby, as of June 30, 1933, is in the sum of Eleven thousand nine hundred ninety-nine dollars and ninety-seven cents (\$11,999.97), in which said amount are included interest and taxes, said indebtedness, however being subject to the offset as hereinafter set out in Paragraph 3 hereof in favor of the plaintiff.

3. That the plaintiff recover of the defendant, Harriet T. Serven, damages in the sum of Six thousand nine hundred forty-five dollars and eighty-three cents (\$6,945.83) in conformity with the opinion of this Court heretofore filed herein, which amount shall be credited against said sum of Eleven thousand nine hundred ninety-nine dollars and ninety-seven cents (\$11,999.97), aforesaid, to which plaintiff is indebted to said defendant, leaving a net amount of Five thousand fifty-four dollars and fourteen cents (\$5,054.14) due from plaintiff to Harriet T. Serven, said award of damages to plaintiff including therein the sum of Two thousand dollars (\$2,000.00) reasonable counsel fees due from the plaintiff to her attorney of record herein, Oscar H. Brinkman, for his professional services rendered her in this cause from the beginning to the date of this Decree, for the recovery and payment of which said attorney's fee said Oscar H. Brinkman is hereby decreed a lien on said plaintiff's interest in said real estate, Lot Twenty-nine (29) in Square Two Hundred and seventy-

nine (279), or the proceeds thereof; said lien in the sum of Two thousand dollars (\$2,000.00) to constitute a valid and subsisting lien and incumbrance upon the plaintiff's interest in the said real estate to come immediately subsequent to any first incumbrance which may hereafter be imposed by way of refinancing in a sum not exceeding
62 six thousand dollars (\$6,000.00).

4. That the defendant, Harriet T. Serven, retain possession of the real estate described herein until the said sum of Five thousand fifty-four dollars and fourteen cents (\$5,054.14) is paid to her by the plaintiff, at which time the defendant, Harriet T. Serven, shall deliver possession of the said real estate to the plaintiff and the defendants, William T. Ballard and Abram R. Serven, trustees, and/or their successors, are required to execute and deliver to said plaintiff such paper or papers as will effectively release and discharge the lien created by the so-called deed of trust dated July 1, 1927.

5. That the defendants, William T. Ballard and Abram R. Serven be and they are hereby removed as trustees under the so-called deed of trust dated July 1, 1927, and Frederick S. Tyler, Harryman Dorsey *and* be and they are hereby appointed as trustees in the place and stead of the defendants, William T. Ballard and Abram R. Serven, and that said substituted trustees be vested with all the title in law and in equity and all the powers that have been conveyed to and vested in the said William T. Ballard and Abram R. Serven by virtue of the said so-called deed of trust.

6. That the plaintiff, Georgia M. Spruill, shall be allowed fifteen (15) days to express her intention of endeavoring to proceed to refinance, and discharge and release the said lien in favor of Harriet T. Serven, which intention shall be expressed by writing filed herein within said fifteen (15) days; and if she fail to so express her intention the said substituted trustees shall proceed forthwith — sell the real estate described herein for cash, but otherwise in compliance with Equity Rule No. 68, and if she so expresses her intention she shall be allowed a further period of
63 thirty (30) days to discharge the lien, and if she shall fail to discharge the lien within the said thirty

(30) days, the said substituted trustees shall proceed forthwith to sell the real estate herein described for cash, but otherwise in compliance with Equity Rule No. 68, provided, however, that the plaintiff shall have the right at any time before said sale to pay to the defendant, Harriet T. Serven, said last mentioned balance and to pay all proper expenses of the proposed sale incurred, in which event the said trustee or trustees appointed as aforesaid and the defendants and the trustees herein and hereby appointed shall execute and deliver to the plaintiff such paper or papers of release, cancellation and satisfaction as mentioned in Paragraph 4 hereof.

7. That the plaintiff and her agents shall have reasonable opportunity of access to the real estate herein described to inspect and appraise said property, provided the attorney for the plaintiff gives notice of one day to the defendant, Harriet T. Serven, or her attorney of the desire of the plaintiff or her agents to so inspect.

8. That if plaintiff shall take an appeal from this Decree or if for any other reason, except by reason of the act or omission of defendant herein, the sale of said property is not closed and settlement made before December 1, 1933, plaintiff shall thereafter be charged with interest on the principal debt and taxes and shall have credit, in addition to the damages hereby awarded only for the rent actually collected by defendants or any of them or their agent, principal, or assigns.

9. That the costs of this action shall be paid by defendants, Abram R. Serven, Harriet T. Serven, and William T. Ballard.

JESSE C. ADKINS,
Justice.

64 Seen:
 In open Court,

From the foregoing, the plaintiff notes an appeal to the Court of Appeals of the District of Columbia, and Bond to act as supersedeas is hereby fixed in the sum of \$1,000.00 and bond for costs is fixed at \$100.00 or cash in sum of \$50.00.

JESSE C. ADKINS,
Justice.

From the foregoing decree the defendants William T. Ballard, Abram R. Serven and Harriet T. Serven note an

appeal in open Court to the Court of Appeals of the District of Columbia. Supersedeas bond fixed at \$1,000, bond for costs fixed at \$100.00 or cash in the sum of \$50.00.

JESSE C. ADKINS,

Justice.

“L.”

Memorandum.

November 10, 1933.—\$50 deposited in lieu of bond on appeal by A. R. Serven.

65 *Defendants' Assignment of Errors.*

Filed November 25, 1933.

* * * * * *

Come now the defendants, William T. Ballard, Abram R. Serven and Harriet T. Serven, by their attorney, George W. Offutt, and say:

1. That the Court erred in finding that the defendants, William T. Ballard and Abram R. Serven, acted in violation of the rights of the plaintiff in conducting the sales in March and July, 1930.

2. That the Court erred in finding that the plaintiff is entitled to the reasonable rental value of her property from November 24, 1931, to June 30, 1933, and to punitive damages.

3. That the Court erred in finding that the plaintiff is entitled to punitive damages, and that she is entitled to an award of damages including counsel fees, among other things.

4. That the Court erred in passing the Final Decree herein.

5. That the Court erred in assessing compensatory damages against the defendants, William T. Ballard, Abram R. Serven and Harriet T. Serven, or any of them.

6. That the Court erred in assessing punitive damages against the defendants, William T. Ballard, Abram R. Serven and Harriet T. Serven, or any of them.

7. In other respects apparent of record.

GEORGE W. OFFUTT,

R. S.,

Attorney for Defendants,

William T. Ballard, Abram R.

Serven, and Harriet T. Serven.

Designation of Record.

Filed November 25, 1933.

* * * * *

Come now the defendants, William T. Ballard, Abram R. Serven and Harriet T. Serven, the appellants in the above-entitled cause and designate the parts of the record which they desire to have included in the transcript, said parts being considered sufficient for the determination of the questions raised on appeal, namely:

1. Amended Bill of Complaint with Exhibits.
2. Answer of defendants, William T. Ballard and Abram R. Serven to Amended Bill of Complaint.
3. Supplemental Answer of William T. Ballard and Abram R. Serven to Amended Bill of Complaint.
4. Supplemental Bill of Complaint.
5. Answers of William T. Ballard and Abram R. Serven to Supplemental Bill of Complaint.
6. Answer of George W. Offutt and Daniel E. Campbell to Supplemental Bill of Complaint.
7. Findings of Facts, Conclusions of Law, Opinion of Court.
8. Intervening Petition of Harriet T. Serven.
9. Order making Harriet T. Serven party defendant.
10. Answer of Harriet T. Serven to the Amended Bill of Complaint and Supplemental Bill of Complaint.
11. Final Decree, Notation of Appeal in open Court.
12. Notation of deposit of cash in lieu of bond on appeal.
13. Assignment of Errors.
14. This Designation.

GEORGE W. OFFUTT,
*Attorney for Defendants, William
 T. Ballard, Abram R. Serven and
 Harriet T. Serven.*

Dated 25 day of November A. D., 1933.

Service of copy acknowledged this 25th day of November,
 A. D., 1933.

O. H. BRINKMAN,
Atty. of Record for Plaintiff.
 HARRYMAN DORSEY.

DISTRICT OF COLUMBIA, ss:

Ross H. Snyder, being first duly sworn, on oath deposes and says that he is a member of the Bar of the Supreme Court of the District of Columbia, and associated in the general practice of Law with George W. Offutt, Attorney; that he personally served a copy of the foregoing Assignment of Errors, and Designation of Record upon Georgia M. Spruill at Four-thirty P. M., Friday, November 24, 1933.

ROSS H. SNYDER.

Subscribed and sworn to before me this 25 day of November, A. D., 1933.

[NOTARIAL SEAL.]

OLIVE E. FITZGERALD,

Notary Public, D. C.

68 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA.

District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 67, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 51443, wherein Georgia M. Spruill is Plaintiff and William T. Ballard and Abram Serven are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court at the City of Washington, in said District, this 19th day of January, 1934.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,

Clerk,

By CHAS. B. COFLIN,

Assistant Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 6142. William T. Ballard, Abram R. Serven and Harriet T. Serven, appellants, vs. Georgia M. Spruill. Court of Appeals, District of Columbia. Filed Jan. 20, 1934. Henry W. Hodges, Clerk.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

APR 27 1934

Henry W. Hodges

CLERK

IN THE

Court of Appeals, District of Columbia

JANUARY TERM, 1934

No. 6142

WILLIAM T. BALLARD, ABRAM R. SERVEN, and HARRIET
T. SERVEN, *Appellants*

v.

GEORGIA M. SPRUILL, *Appellee*.

No. 6154

GEORGIA M. SPRUILL, *Appellant*

v.

WILLIAM T. BALLARD, ABRAM R. SERVEN, and HARRIET
T. SERVEN, *Appellees*.

**BRIEF FOR APPELLANTS AND APPELLEES
RESPECTIVELY.**

GEORGE W. OFFUTT,
ROSS H. SNYDER,
*Attorneys for Appellants and
Appellees.*

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v.

WILLIAM T. BALLARD, ABRAM R. SERVEN, and HARRIET
T. SERVEN, *Appellees*.

**BRIEF FOR APPELLANTS AND APPELLEES
RESPECTIVELY.**

STATEMENT OF CASE.

That the Court may have a complete statement of the case, there is quoted herein verbatim the Findings of Fact of the Supreme Court of the District of Colum-

bia (R. pp. 33-41), with addition of price bid for the property by Mary Hannanghan in italics, and, with the exclusion of Finding 15:

“1. For sometime prior to the filing of this suit plaintiff had operated a rooming house at premises 27 Iowa Circle, now Logan Circle, being subplot 29 in Square 279, in the City of Washington. She bought the house in 1927. At the time of the purchase she arranged to borrow \$9,000 through defendant Ballard with which to purchase the property. Mr. Ballard has been engaged for many years in the real estate business in Washington. He appraised the property at that time at \$15,000.

“2. Defendant Ballard has had many dealings with defendant Abram R. Serven. Mr. Serven is a lawyer, in active practice, and for many years a member of the bar of this Court. He handles moneys belonging to his wife. On July 1, 1927, plaintiff obtained a loan of \$9,000 from Mr. Ballard. She executed three promissory notes, one for \$7,000 and two for \$1,000 each, all payable three years after date to the order of K. A. Rhinebold, and secured by deed of trust on the above mentioned property. The trustees in the deed of trust are William T. Ballard and Abram R. Serven. Plaintiff did not read the deed of trust at the time of its execution, nor was she told in detail of its contents.

“3. Mr. Ballard had the deed of trust prepared and decided who the trustees were to be; Serven did not know he had been named trustee until the dispute arose in this case. The payee of the notes, Miss Rhinebold, was a clerk in Ballard's office. At the direction of Ballard she endorsed the notes to Serven. Ballard thereupon took the notes to the office of Serven. Mr. Serven is nearly blind and cannot see sufficiently to read. The endorsement of the notes was not shown to him

and he did not know of their form until this dispute arose.

"I find as a fact that the amount of the notes was paid out of the funds belonging to and being the separate property of Harriet T. Serven, wife of the defendant, Serven, and that the notes were her property and were held by her husband for her as her agent or trustee.

"The transaction was handled by Ballard in his usual manner and the notes were made payable to his clerk in accordance with his usual practice.

"4. Until sometime in 1929 plaintiff conducted her rooming house in such manner that out of the moneys realized therefrom she was able to pay current expenses, taxes and the interest on the loan, and to obtain for herself a living, including clothing. However she was not able to pay the instalment of taxes which fell due in September, 1929, amounting to \$98.45, and she was not able to pay the interest of \$292.50 due January 1, 1930. The profits from her rooming house were insufficient to enable her to make these payments.

"5. Plaintiff applied to Ballard and obtained extensions to February 15, 1930, within which to pay the interest due on January 1. She informed Ballard that when the loan matured on July 1 she expected to refinance the loan and to pay off the notes involved in this case. During these discussions plaintiff asked Ballard for the name of the holder of her notes. Her object was to make personal application to the holder for further extensions. Ballard refused to give her the name of the holder. His reason for refusing was that it was not customary to do so and he feared that Mrs. Serven would be annoyed by repeated visits from plaintiff. I find that Mr. Ballard's reason was a good one, and that his refusal was justifiable.

“6. On February 26, 1930, after the extensions above, plaintiff failed to pay the interest due and the trustees advertised the property for sale at public auction, the sale to be held on March 10, 1930. Shortly after the first advertisement was issued Ballard mailed plaintiff a copy of the advertisement. The advertisement was in the usual form and was inserted the usual number of times in a newspaper published in the city of Washington. Upon receipt of the advertisement plaintiff borrowed and tendered to Ballard the amount of interest then in default, and offered to pay the cost of advertising to the date of that tender. Ballard refused to accept the tender, asserting that the trustees were entitled to a commission of $2\frac{1}{2}\%$ or \$225 under the deed of trust. On March 10, 1930, plaintiff paid the taxes on the property which became due in September, 1929.

“The sale was conducted on March 10, 1930, by Thomas J. Owens & Sons, auctioneers. Plaintiff was present. Defendants did nothing to depress the price to be obtained and did nothing which was otherwise inconsistent with their duties as trustees to the party secured and to the maker of the notes. The property was sold to Mary Hannanhan for \$9,550.00 (R. p. 17), and she made the required deposit of \$300 cash. She thereafter refused to complete the sale. She was acting as agent for plaintiff in bidding in the property. Owens deducted the expenses of the sale and paid the balance to Mr. Ballard, and the latter now holds the same amounting to approximately \$185. The trustees were of opinion that this amount was forfeited by the purchaser because of her failure to complete the purchase.

“7. Thereafter plaintiff employed as her attorney Mr. Brinkman. He obtained a written extension of the time to settle the costs and expenses of said sale until May 21, 1930.

“At some time Mr. Ballard withdrew his insistence that commissions be paid on the March auction sale but he always insisted that plaintiff was liable for and should pay the costs of that sale, that is, advertising expenses and auctioneers’ fees amounting to about \$115.

“8. Before the expiration of said extension the original bill of complaint was filed in this cause. Thereafter an amended bill of complaint was filed, and on July 3, 1930, a decree was signed dismissing the amended bill, from which an appeal was duly taken and perfected by plaintiff, she giving a cost bond.

“9. On July 1, 1930, the notes secured on said property all fell due. Plaintiff endeavored to raise sufficient money with which to pay off the notes and refinance her loan but was unable to do so. It is not disputed that plaintiff borrowed in cash the \$9,000 represented by said notes, and that she was legally obligated to pay the same on and after July 1, 1930. It is admitted that the holder of the notes, Mrs. Serven, was then entitled to be paid. At that time she had the choice of various remedies. Apparently the handling of the matter was left with Mr. Ballard. He believed that values of real estate in Washington were declining and that a sale should be made promptly in view of plaintiff’s inability to pay the indebtedness. Accordingly the trustees proceeded to sell the property under the deed of trust. On July 6, 1930, they advertised the property for sale at public auction, the sale to be held on July 16. On that day in accordance with the advertisement Ballard and Serven offered the real estate described in the deed of trust for sale at auction through Thomas J. Owens & Sons, auctioneers. Plaintiff was present at the sale. The trustees did nothing to depress the price or to lessen the amount to be obtained at that sale. In deciding to sell the property under the deed of trust I find

that the trustees were acting in good faith and in the belief based upon reasonable grounds (including the decision of this court) that they had the legal right to do so.

“10. Ballard acting on behalf of Mrs. Serven, owner of the notes, procured defendant William D. Buck to attend the sale and to bid on the property. The sale was conducted in the usual manner. Plaintiff at the auction notified Mr. Buck that he could not obtain good title through the sale. The auctioneers' recollection is that at least two bids were made on the property. Mr. Buck bid \$10,500, and that bid was accepted by the auctioneer. Buck made a deposit of \$300 but that was later returned to him by Ballard. The terms of the sale were one-third cash and the balance in two instalments. Buck received a deed to the property and gave two notes for \$3,500 each, but did not make the cash payment of \$3,500. The evidence shows that some agreement was made between Ballard and Buck under which the latter had the option to return the property when the litigation was terminated or to keep it. It is not necessary to decide the exact details of this arrangement. I find that in making the purchase Buck was acting in behalf of the owner of the notes, Mrs. Serven.

“The trustees Ballard and Serven executed a trustee's deed to the property dated August 1, 1930, conveying the property to said Buck. He executed two notes, each for \$3,500, and executed a deed of trust conveying the property to George W. Offutt and Daniel E. Campbell as trustees to secure the trustees Ballard and Serven for the payment of said notes.

“11. Thereafter defendant Buck brought suit in the Municipal Court of this District in landlord and tenant proceedings against plaintiff to secure possession of premises 27 Logan Circle.

Defendant demanded and obtained a jury trial. At the trial the court directed a verdict for defendant for possession. On October 17, 1930, judgment was entered on the verdict for defendant for possession of the premises. Application to the Court of Appeals by plaintiff herein for writ of error was denied. On November 24, 1930, a writ of restitution was executed by a Deputy Marshal. Plaintiff knew that the writ of restitution was to be executed. She refused entrance to the house and it was necessary for the Deputy to break the outer door. The furniture and goods of plaintiff were moved upon the street and remained there about twenty-four hours. A picture of the furniture in this condition was taken and published in one of the newspapers in Washington. Defendants had nothing to do with the taking of the picture or its publication. The next day the property clerk of the police department took possession of the furniture and has held it ever since, except a small portion which was returned to plaintiff shortly after the eviction. Until the spring of 1932, plaintiff was told she could not have the furniture unless she paid the accumulated storage charges. In the spring of 1932, she was told by the property clerk that she could have the furniture at any time she would take it, and without making any payment whatever. Plaintiff declined to take possession of the property. She testified she had no place to put it and she saw no reason why she should take possession of it if the police department would keep it for her without any charges.

“12. Shortly after defendant Buck obtained possession of the property Ballard rented the same to Manolah Brennan by the month for \$50 per month, said monthly agreement to remain in force until the litigation in this case was decided, and in the event the litigation were favorable to defendants, Ballard and Serven, the tenant Mano-

lah Brennen had the option to purchase the property for \$10,000. The property was then in good structural condition but in need of plumbing repairs and refinishing. Said Brennan proceeded to make numerous repairs, papering the same at a cost of \$150, replacing a bathtub and replacing other cracked and worn plumbing. After repairing and refinishing the house as aforesaid said Brennan furnished it and then sublet it at the rate of \$100 per month.

“13. Ballard has collected the rent from said Manolah Brennan and has paid the taxes upon the property and \$46 for repairs to the roof. Ballard has retained the moneys collected by him to await the outcome of this litigation. They now aggregate about \$1,000.

“14. Plaintiff testified that at the time of the eviction the house was damaged in certain respects; that just before the trial she had gone through the house and she described certain alterations made in it which she thought were injurious to the property. Thereupon her counsel moved to refer to a Master the question of damages. In support of his motion he stated that plaintiff had only recently learned of the alterations and damages to the property and she was without funds to obtain witnesses to prove the extent of these damages. I thereupon offered to go through the property in the presence of counsel and the parties and to endeavor to obtain a disinterested witness from the office of the building inspector in the District to testify to the cost of restoring the property to its original condition. Plaintiff's counsel refused to accede to this suggestion, stating that he would object to any employee of the District as a witness, and that he preferred to get his own witnesses. He further stated that he thought an inspection of the premises by me would be useless as he did not think I

was qualified to form a judgment upon the extent of injuries and changes and the cost of repairs and restoration. Therefore I have not inspected the premises. Upon the evidence before me I am unable to find the extent of any alleged injuries, alterations and damages, or to find what it would cost to repair and restore the property to its original condition.

“16. Plaintiff has never been prepared and able to pay the amount due from her upon the notes aggregating \$9,000 herein described. She was not able to pay them at the time of their maturity or at the time of the auction sale in 1930 and she has never since been able to pay them.

“17. The reasonable rental value of the house here involved when furnished is \$1,400 per year. Only \$100 is being paid at the present time, and Ballard as an expert testified that was the reasonable value. The house has been rented in an unfurnished condition for \$50. The taxes upon the property and interest on Mrs. Serven's loan aggregate about \$800. I find that the rental value of the property unfurnished is \$800 per year and that the presence of furniture adds \$600 per year to its value.

“There is no evidence in the case upon which I can find the fair market value of the house in 1930 or at the present time.

“18. Plaintiff claims punitive damages in a large amount. Whether she is entitled to punitive damages I regard as a close question.

“The evidence is convincing that she was wholly unable to pay the debt and interest which she owed on July 1, 1930, when the notes matured. The holder of the notes demanded about \$115 for the expenses of the March sale. This I find she was not entitled to. I think it probable however that had the plaintiff been able to pay the principal and interest due upon her notes this claim

for \$115 would not have prevented settlement of the case.

“In advertising the property for sale I find that defendants were acting in good faith. This court had held that plaintiff's bill did not state a cause of action. Plaintiff was unable to pay her debt and therefore it was reasonable to assume that defendants were entitled to proceed in the usual way. At such a sale the holder of the notes had the right to buy the property in order to protect herself. She had the right to buy the property in her own name or to have an agent buy it for her.

“I have difficulty in deciding why the property was bought in the manner heretofore found. Counsel who argued the motion to dismiss was not consulted and I assume defendants acted on their own judgment. I have reached the conclusion that the trustees desired to acquire control of the house on behalf of the owner of the notes and that they preferred not to disclose the fact that the property was being acquired on her behalf, but preferred that the purchaser should appear to be acting independently and on his own behalf. There was a lack of frankness and it seems to me an element of oppressiveness in purchasing the property in this way. Therefore I have finally decided that the case is one in which punitive damages may be allowed.

“The attorney for plaintiff sincerely contended that the punitive damages should be sufficient in amount to enable plaintiff to acquire her property entirely relieved of her debt of \$9,000. It seems to me that such a finding would be unjust.

“When the sale was completed plaintiff was evicted from the premises. There is no evidence to justify the belief, had the property been sold by Ballard alone or by a trustee appointed by this court, that more than \$10,000 could have been obtained. If there had been a judicial sale at that

price plaintiff would have been evicted from the property.

“I think punitive damages should be large enough to include counsel fees and cover something for the plaintiff herself. I fix punitive damages in the sum of \$3,000.

“This is arrived at by allowing \$2,000 to cover counsel fees and allowing \$1,000 otherwise.

“If I am wrong in concluding as matter of law that counsel fees may not be allowed as part of actual damages, and the Court of Appeals should allow counsel fees as such damages, my finding of punitive damages should be reduced to \$1,000.

“19. In 1932 and 1933 defendants have paid for taxes on said property sums aggregating \$393.80.

“20. Plaintiff's furniture has been and is now in the custody of the property clerk of the police department. For more than a year it has been at her disposal whenever she wanted it and without costs to her. The allowance of the rental value of the house in a furnished condition renders unnecessary any further finding with respect to the furniture. There was no evidence to justify a finding that the furniture was injured in any way.”

These appeals are from a decree of the Supreme Court of the District of Columbia, and the parties will appear herein in the order in which the appeals were filed in this Court, the first by William T. Ballard, Abram R. Serven and Harriet T. Serven, as Appellants, vs. the Appellee, Georgia M. Spruill, No. 6142, and Georgia M. Spruill, Appellant vs. William T. Ballard, Abram R. Serven and Harriet T. Serven, Appellees, No. 6154. For convenience Appellee and Appellant Georgia M. Spruill will be referred to herein as plaintiff and Abram R. Serven, William T. Ballard

and Harriet T. Serven as defendants. One brief is filed herewith on behalf of the defendants, William T. Ballard, Abram R. Serven and Harriet T. Serven, Appellants and Appellees, respectively, by leave of the Court first had and obtained.

ASSIGNMENT OF ERRORS.

“Come now the defendants, William T. Ballard, Abram R. Serven and Harriet T. Serven, by their attorney, George W. Offutt, and say:

1. “That the Court erred in finding that the defendants, William T. Ballard and Abram R. Serven, acted in violation of the rights of the plaintiff in conducting the sales in March and July, 1930.

2. “That the Court erred in finding that the plaintiff is entitled to the reasonable rental value of her property from November 24, 1931, to June 30, 1933, and to punitive damages.

3. “That the Court erred in finding that the plaintiff is entitled to punitive damages, and that she is entitled to an award of damages including counsel fees, among other things.

4. “That the Court erred in passing the Final Decree herein.

5. “That the Court erred in assessing compensatory damages against the defendants, William T. Ballard, Abram R. Serven and Harriet T. Serven, or any of them.

6. “That the Court erred in assessing punitive damages against the defendants, William T. Ballard, Abram R. Serven and Harriet T. Serven, or any of them.

7. “In other respects apparent of record. (R. p. 51).

SUMMARY OF ARGUMENT.

Five principal propositions are relied upon by defendants on their appeal and answer to plaintiff's appeal.

1. The rule expressed by this Court in *Spruill v. Ballard*, et al., 61 App. D. C. 112, does not apply to the facts as established in the trial in the Supreme Court of the District of Columbia after the former appeal.

2. That one trustee acting under and by virtue of the deed of trust is sufficient.

3. That the party secured by the deed of trust may bid at the foreclosure.

4. That the sale of July 16, 1930, was valid and should stand.

5. That no damages, either compensatory or punitive, should have been found against the defendants.

ARGUMENT.

I.

The Rule Expressed By This Court in *Spruill v. Ballard* et al., 61 App. D. C. 112, Does Not Apply to the Facts As Established in the Trial in the Supreme Court of the District of Columbia After the Former Appeal.

In announcing the rule in the first appeal of this case by plaintiff, this Court in reversing the Decree of the lower Court dismissing the amended Bill of Complaint upon the allegations that Ballard occupied a dual capacity as owner of the note and trustee, said:

“If the allegations of the bill in these respects are true, and on the motion to dismiss they must be so regarded, we are of opinion that such facts disqualified Ballard to act that disinterested and impartial part his duty assigned to him; and that the ownership of the debt made him a mortgagee without the right to exercise the power of sale conferred by the deed without first applying to a court for its aid in a foreclosure; or, of course, he might have applied to the court for the substitution of another disinterested trustee.” (61 App. D. C. pp. 113-114).

The facts were, as now found on the trial of this case, that defendant, Ballard, had no interest in the notes, but that Mrs. Serven was the owner; that the same was purchased out of her separate estate; that the trustee Abram R. Serven took no active part in the proceedings at any time, and in fact until the controversy arose did not know that he had been named trustee. There was not one scintilla of evidence to show that Mr. Serven did anything contrary to his duties as trustee or that could have in any wise prejudiced the rights of the plaintiff. On the other hand, it is conclusively found that the trustees acted in good faith, and in the belief that they had a legal right to conduct the sale.

The present case may be distinguished in almost every way from the case of *Holman v. Ryon*, 61 App. D. C. 10. In that case it was apparent that there was a conspiracy to deprive the debtor of his property and have the creditor who happened to be the wife of the defendant trustee profit by the loss of the debtor. The case reeked with fraud and collusion. In the present case, there was neither fraud nor collusion. Here the Court in his Findings of Fact said:

“In deciding to sell the property under the deed of trust, I find that the trustees were acting in good faith and in belief based upon reasonable grounds (including the decision of this court) that they had the legal right to do so.” (R. p. 37).

The Court had held that the plaintiff's Bill of Complaint did not state a cause of action. Plaintiff was unable to pay her debt, and therefore it was reasonable to assume that the defendants were entitled to proceed in the usual way. At such sale the holder of the notes had the right to buy the property in order to protect herself. She had the right to buy the property in her own name or to have an agent buy it for her. (R. p. 40).

Plaintiff was present at the sale. The trustees did nothing to depress the price or lessen the amount to be obtained at that sale.

The rule expressed in *Holman v. Ryon*, supra, defines the duties of trustees and their relationship with the parties and is as follows:

(2-4) “A trustee named in deed of trust to secure a loan sustains a fiduciary relationship to the debtor as well as to the creditor. *Church v. Holmes*, 60 App. D. C. 27, 46 F. (2d) 608. In the event it becomes necessary to sell the trust property, it is his duty not only to conform to the legal requirements, but to see that the sale is conducted fairly, to the end that a reasonable amount may be realized therefrom. ‘Where there has been misconduct on the part of the trustees affecting the fairness of the sale, or where they have violated the terms of the trust in any material particular, or where the sale has been upon such inadequate consideration as to shock the conscience and of itself suggest fraud or misconduct, equity will interpose and set aside the

sale upon the application of the mortgagor and sometimes of the mortgagee'. *Anderson v. White*, 2 App. D. C. 408, 418. Such sales usually take place after short notice, there is no right of redemption, and it is common knowledge that trustees in the conscientious performance of their duty, will postpone a sale if conditions are so unfavorable as to preclude the possibility of a reasonable bid for the property. A trustee, therefore, should scrupulously avoid placing himself in a position where his interests might conflict with the interests of those whom he represents."

The cases therein cited denying the right of a trustee to sell to his wife may be distinguished by suggesting that the case of *Dundas Appeal*, 64 Pa. 325, was a sale by an executor of certain property of the decedent's estate to the executor's wife, and on exceptions being filed to his account, the matter was referred to a master who found the sale price inadequate. The sale was ratified but the executor was required to account for the difference between the sale price and the true market value. The case of *Frazier v. Jenkins*, 64 Kan. 615, was a sale of real property by a wife, as guardian of an infant's estate, to her husband. *Tyler v. Sanborn*, 128, Ill. 136, was a case where a real estate agent had sold property for his principal, the purchaser defaulting and thereafter at the suggestion of the agent's wife, he had the purchaser accept a deed and immediately convey to the agent's wife, the wife paying for the property from her own estate. The objections voiced by the courts in these cases were: relationship, possible interest of the husband in the wife's property, and a temptation to abuse. The principle underlying these cases is distinguished from the instant case in that there the fiduciary had absolute

control of the property for the benefit of the *cestui* while here, as was said by this Court in *Jaeger v. O'Donoghue*, 55 App. D. C. 383, at page 385:

“The trustees are primarily the agents of the person secured by the deed of trust and are merely intended as such to act in his place in enforcing the obligations thereby secured, in the event of the default of the grantor.”

In *Clark v. Eaton*, 100 U. S. 149, 25 L. Ed. 573, the trustee named in a deed of trust to secure Freedman's Savings and Trust Company was actuary of the Bank and in a suit to set aside the sale on that ground, among others, the Supreme Court said (p. 574):

“Touching this objection it is sufficient to say that the deed was not made to Eaton in his capacity as an officer of the Company, nor did he act in that capacity when exerting the authority conferred upon him. The fact that he held official relations to that Company did not incapacitate him from accepting the trust set out in the deed of June 22, 1870, or from discharging the duties thereby imposed. It is true that his relations to the Company would make it the duty of the Court to scrutinize very closely all that he did in the execution of the trust; but we find nothing in the evidence to justify the belief that he acted otherwise than honestly and faithfully in the discharge of his duty.”

See *Anderson v. White*, *supra*.

Good faith and fairness to all parties are all that are required of trustees acting in the execution of a trust created by a deed of trust, and that they act in accordance with the authority granted them by the instrument. See cases cited in 57 A. L. R. 468, note;

Brown v. Oriental University, 44 App. D. C. 414. In *Crawford v. Gray*, 131 Ind. 53, it was held that an executor selling property at public auction might sell to his wife, the Court suggesting that a wife had quite as distinct and individual an existence relating to her right to contract for or purchase real estate as did her husband. The rule in this case is also found in Section 1154 of the Code of Laws of the District of Columbia, (1929 Code Title 14, Chap. 2, Sec. 21):

“Sec. 1154. PROPERTY OF WIFE. Married women shall hold all their property, of every description, for their separate use as fully as if they were unmarried and shall have power to dispose of the same by deed, mortgage, lease, will, gift, or otherwise, as fully as if they were unmarried: *PROVIDED*, That no disposition of her real or personal property, or any portion thereof, by deed, mortgage, bill of sale, or other conveyance, shall be valid if made by a married woman under twenty-one years of age.”

This is contrary to the principle expressed in *Frazier v. Jenkins*, and *Tyler v. Sanborn*, *supra*. While there may be no conflict in the authorities denying the right of a trustee to deal with the trust property for his own benefit, we think that rule has no application here and to apply generally the rule expressed in *Holman v. Ryon*, *supra*, would work a severe hardship upon the creditor, Mrs. Serven. We suggest that the elements existing in the *Holman v. Ryon* case, *supra*, of fraud, unfairness, inadequacy, or any act on the part of the trustees which in any wise tended to jeopardize the rights of the plaintiff or indicate partiality in favor of the creditor, defendant Mrs. Serven, over the plaintiff, are totally lacking here. It was the duty of the trustee to sell on demand of the

party secured and in the manner prescribed in the deed of trust, all of which was done. See *Anderson v. White* and *Holman v. Ryon*, *supra*. It also seems quite clear that the fact that defendant, Mr. Serven, held the notes as agent or trustee in no wise altered his duty in the premises as he is, as trustee under the deed of trust, bound to exercise reasonable diligence and may be responsible to the creditor for breach of his trust. See *Parsons v. Little*, 28 App. D. C. 218.

On the other hand the plaintiff in seeking equity has at no time made any tender of other than part of the charges due, although the debt has long since matured.

II.

That One Trustee Acting Under And By Virtue of the Deed of Trust is Sufficient.

The record before this Court is that the trustee, defendant Ballard, was the active trustee throughout the entire transaction, as evidenced by the fact that he negotiated the loan, collected the interest, made all demands and took all steps necessary to institute the foreclosure at the request of defendant, Mrs. Serven, the creditor. Defendant Ballard had no possible interest in the debt secured by the trust and as to him, under all the authorities, the trust was valid. Defendant Mr. Serven by reason of his physical impairment was unaware that he was trustee or that the notes were indorsed to him personally, and at no time until after the default by the plaintiff was he so advised. The only action taken by defendant Mr. Serven was to join with defendant Ballard in the publication and later to execute the trustees' deed with Ballard to the purchaser, William D. Buck. In view of these undisputed facts, it is urged that the rule

expressed in *Smith v. Black* 115 U. S. 308, 29 L. Ed. 398, should here govern. In that case the Court said (p. 402):

“ * * * The creditor has rights as well as the debtor, and where, in the case of two trustees, the sale is conducted as in this case, in pursuance of a notice signed by both of them, conforming to the deed of trust, and previously publicly advertised, and one of them is present, and the sale is fairly and properly made, and the proceedings under the deed of trust are otherwise regular, and both of the trustees afterwards execute such a deed as was executed in this case, there is no ground of public policy or private right which requires it to be held that the absence of the second trustee vitiates the sale.”

While it may be urged that this rule has no application here, to disqualify defendant Mr. Serven as trustee, is to say that he was guilty of some act of misfeasance in his duty. Certainly nothing in any wise reflecting upon him is in or out of the record in this case. Defendant Mr. Serven was not the creditor, he was not buying at his own sale, and we believe he was competent to act as mere conduit of title.

III.

That the Party Secured by the Deed of Trust May Bid At the Foreclosure.

Defendant Mrs. Serven was the creditor secured by the deed of trust. The property was bid in at the sale of July 16, 1930, by her agent, William D. Buck, and the Court so found.

Section 544 of the Code of Laws of the District of Columbia is herewith quoted (1929 Code, Title 25, Chapter 6, Sec. 207):

“Sec. 544. CREDITOR BUYING. If a creditor, for the payment of whose debt property shall be sold under a deed of trust, shall become the purchaser at such sale, he shall be entitled to credit the amount of the purchase money against the debt, and shall be only required to pay to the trustee the excess of the purchase money over his debt, together with such additional amount as may be necessary to defray the expenses of the sale.”

Under the above Statute, defendant Mrs. Serven having a right to bid, had the corresponding right to delegate an agent to bid for her. The price bid, \$10,500.00, is indicative, if not conclusive, of the fact that there was no desire to bid in the property at a low price, and is \$950.00 in excess of the bid made by the plaintiff at the previous sale through plaintiff's agent.

IV.

That the Sale of July 16, 1930, Was Valid and Should Stand.

After a careful examination of the record of both appeals, it is not apparent that either defendant Ballard or defendant Mr. Severn as trustees violated any of the rights of the plaintiff. Default had occurred in the payment of the debt secured. No tender was made by the plaintiff then or since, of the amount due. Neither of the trustees had any personal interest in the transaction. They did not bid at the sale nor did any one bid for them, and they followed the terms of sale as set forth in the Deed of Trust.

**That No Damages Either Compensatory or Punitive
Should Have Been Found Against the Defendants.**

The question of damages is herein referred to generally, but under the view taken by counsel for defendants, i. e., that the sale of July 16, 1930, was valid and should stand, plaintiff is not entitled to recover damages.

The holder of the notes secured on plaintiff's property was entitled to have the property sold. Plaintiff in seeking the aid of an Equity Court has at no time made an offer to pay what was justly due. It would appear that the familiar axiom, "He who seeks equity must do equity," applies, and too, the findings of fact hereinbefore recited show conclusively that the defendants acted throughout in good faith, without malice and in the belief that they had a legal right to do that which was done, based upon the long established custom in foreclosure under deeds of trust and the decision of the lower court in dismissing plaintiff's Amended and Supplemental Bill of Complaint.

Punitive damages are never allowed except where an act has been done by a defendant or by someone with his authority with a reckless disregard of the rights of the other party. *Sommerville v. C. & P. Tel. Co.*, 49 App. D. C. 3; that such was not the case here is evident from the findings of fact. The Trial Court "found" a "lack of frankness" in the procedure adopted by defendant Ballard in the purchase by Buck for Mrs. Serven and the conclusions of law held this to amount to "oppression."

"The definition of oppression as given by Webster is 'unjustly burdensome or rigorous, as oppressive laws; exacting, tyrannical; producing a

sense of depression physical or mental; overpowering'."

This "lack of frankness" did not amount to oppression within the meaning of the definition given. The defendant, Mrs. Serven, had then and still has, a right to (1) payment of the debt owed by plaintiff or (2) foreclosure of the trust. No question is raised of or concerning the validity of the loan and the long delay was caused by the filing of the suit by plaintiff and the appeal. The defendant, Mrs. Serven, has not asserted an illegal or void claim nor has there been any action taken by her to which she was not entitled. The Decree of the lower court includes an order that the property be sold to liquidate the debt. The only claim made by Mrs. Serven is that she is entitled to payment of the debt due her. This is not oppression, malice or in disregard of the rights of the plaintiff. The most that plaintiff is entitled to under the prayers of her bill is that the property be foreclosed under the supervision of a Court of Equity. A careful examination of the record in this case does not indicate that a different or better result could have been obtained on behalf of the plaintiff or that her rights have been prejudiced in any wise by the procedure taken.

The doubt expressed by the Lower Court as to the award of punitive damages should have been resolved in favor of the defendants.

The award of Counsel fees as an element making up the punitive damages was clearly error in the light of the following:

"In *Kansas City Southern Railway Company v. Guardian Trust Company*, 281 U. S. 4, 74 L. Ed. 659, reading from the Law Edition, report of the case on page 667, the Court said as follows:

“ ‘The decree here affirmed required the “taxation of costs . . . under the principles, rules and practice, in equity.” It undoubtedly covered ascertainment of amounts taxable between party and party. There was no specific reference to any additional allowance. The language used disclosed no intention to require more than the usual taxation. When used in a judgment or decree without qualification, the words “costs” means the amount taxable as such under Acts of Congress, rules promulgated by its authority and practice established consistently with governing enactments. *Newton v. Consolidated Gas Co.*, 265 U. S. 78, 83, 68, L. Ed. 909, 910, 44 Sup. Ct. Rep. 481; *Ex parte Peterson* 253, U. S. 300, 316, 64 L. Ed. 919, 926, 40 Supt. Ct. Rep. 543. In actions at law costs follow the result as of course, but in equity costs not otherwise governed by statute are given or withheld in the sound discretion of the court according to the facts and circumstances of the case. The nominal amounts fixed by Statute (U. S. C., Title 28, Sec. 571, 572) and taxable as attorneys’ fees are not meant to cover the compensation to which lawyers in charge of the litigation are reasonably entitled. A decree merely allowing costs to be taxed does not mean that anything is to be included on account of counsel fees in addition to the amount specified in the statute. Even if it be assumed that federal equity courts have jurisdiction to allow costs as between solicitor and client and to include therein attorneys’ fees in excess of the amount prescribed by statute,—and as to that we express no opinion,—the purpose to authorize such costs and to make such allowance should be clearly expressed in the decree. 2 Dan. Ch. Pl. & Pr. 6th Ed. p. 1410.”

Attention of the Court is called to the following Sections of our Code:

“Sec. 1108. NOTHING HEREIN TO PROHIBIT AGREEMENTS WITH CLIENTS. The following, and no other, compensation shall be taxed and allowed to attorneys, solicitors, proctors, district attorney, clerk of the Supreme Court of the District, marshal, commissioners, witnesses and jurors, except in cases otherwise provided for by law; but nothing herein shall be construed to prohibit attorneys, solicitors, and proctors, from charging or receiving from their clients other than the Government such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage or may be agreed upon.”

“Sec. 1109. ATTORNEYS, SOLICITORS, AND PROCTORS.—On a trial before a Jury in civil or criminal causes or before referees, or on a final hearing in equity, or admiralty, a docket fee of Twenty Dollars.”

CONCLUSION.

From the foregoing it is therefore submitted:

1. That the lien of the defendant, Mrs. Serven, was valid and subsisting.
2. That the deed of trust to defendants Ballard and Serven was valid with power of sale in them.
3. That the sale of July 16, 1930, should have been ratified and confirmed.
4. That no damages should have been awarded to plaintiff.

Respectfully submitted,

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Appellees.*